

THE
New Instructor Clericalis,
STATING
The AUTHORITY, JURISDICTION, and
MODERN PRACTICE
OF THE
Court of Common Pleas.

WITH,
DIRECTIONS for commencing and defending Actions,
entering up Judgments, suing out Executions,
and proceeding in Error.

TO WHICH ARE ADDED,
The Rules of the Court, Modern Precedents, and several
other Matters necessary to be known by Attornies
and their Clerks,

IN TOWN AND COUNTRY.

The whole illustrated by useful Notes and Observations from
the best Authorities; and a copious Index.

By JOHN IMPEY, INNER-TEMPLE.

The FOURTH EDITION, Corrected; with consider-
able Additions from all the *printed* Cases, and several
not in Print, down to the present Time.

L O N D O N :

Printed by A. STRAHAN and W. WOODFALL,
Law Printers to the KING's most Excellent MAJESTY,
For J. BUTTERWORTH, Fleet Street.

1794.

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TO
THE RIGHT HONOURABLE
SIR JAMES EYRE, KNIGHT,
LORD CHIEF JUSTICE OF HIS
MAJESTY'S COURT OF
COMMON PLEAS,
THE FOLLOWING WORK
IS
(BY HIS PERMISSION)
MOST RESPECTFULLY INSCRIBED,
BY
HIS MOST OBEDIENT, AND
OBLIGED HUMBLE SERVANT,
THE AUTHOR.

NEW EDITION

STATUTE

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P R E F A C E.

IT is now upwards of three years since the third edition of the following work made its appearance, and was received by the profession with approbation. Since which the author has bestowed much time and attention in making considerable improvements, and *material* alterations. Some passages which were exceptionable, have been rectified, and others that were doubtful are explained ; and the several adjudications of the court, are continued as far as published.

In farther addition, the author has added some *new heads*, with *many cases* determined, and not in print, as also the new rules of court ; also, he has distinguished the practice of this court from that of the King's Bench, in the several instances in which they vary, and agree ; and used his best endeavour to make the work as perfect as possible.

If

P R E F A C E.

If any inaccuracies should yet remain, the author trusts that the profession will view them with their accustomed liberality and candor.

The additions amount to upwards of one hundred pages.

INNER TEMPLE,

1st January 1794.

T H E

Authority and Jurisdiction

O F T H E

Court of Common Pleas.

BY the Saxon constitution there was only one superior court of justice in the kingdom: and that had cognizance both of *civil* and *spiritual* causes, viz. the *wittenagemot*, or general council, which assembled annually or oftener, wherever the king kept his *easter*, *christmas*, or *whitsuntide*, as well to do private justice as to consult on publick business. But after the conquest, the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, made up of the officers of his palace, who transacted the business, both *criminal* and *civil*, as well as matters of the *revenue*. When they sat in the hall, they were called a court *criminal*; when up stairs, a court of *revenue*: the *civil pleas* they held in either court. This court was called by *Bracton* and other authors, *aula regia*, or *aula regis*. *Bract. lib. 3. c. 7.* These high officers were assisted by certain persons learned in the laws, who were called the king's *justiciars* or *justices*, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. These in

By Saxon constitution only one superiour court.

B

their

The Authority and Jurisdiction

their several departments transacted all secular business both criminal and civil, and likewise matters of the revenue: and over all presided one special magistrate, called the *chief justiciar*, or *capitalis justiciarius totius Angliæ*; who was also principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. And this officer it was, who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people, and dangerous to the government which employed him. *Spelman's Gloss.* 331, 2, 3. *Gilb. C. P.* 17.

Court of Common Pleas to be holden in some place certain.

This great universal court being bound to follow the king's household in all its progresses and expeditions, the trial of common causes therein was found very burthenfome to the subject. Wherefore king *John*, who dreaded also the power of the *justiciar*, very readily consented to that article which now forms the eleventh chapter of *magna charta*, and enacts, "that *Common Pleas shall not follow our Court, but shall be holden in some place certain.*" This certain place was established in *Westminster-hall*, the place where the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief, with other justices of the common pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject: which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it.

The

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief *justiciar* being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of *Henry* the third. And, in further pursuance of this example, the other several offices of the chief *justiciar* were under *Edward* the first (who new-modelled the whole frame of our judicial polity) subverted and broken into distinct courts of judicature. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a cheque upon each other; the court of *chancery* issuing all original writs under the great seal to the other courts; the *common pleas* being allowed to determine all causes between private subjects; the *exchequer* managing the king's revenue; and the court of *king's bench* retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown, or criminal causes: For pleas or suits are regularly divided into two sorts; *pleas of the crown*, which comprehend all crimes and misdemeanors, wherein the king (on behalf of the publick) is plaintiff; and *common pleas*, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of *king's bench*; the latter of the court of *common pleas*; which is a court of record, and is styled by Sir *Edward Coke*, "the lock and key of the common law;" 4 Inst. 99. for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal pleas between man and man, are here determined; though in the latter the king's bench has also a concurrent authority.

The *aula regia* stripped of a branch of its jurisdiction.

This court, without any writ, may, upon a suggestion, grant prohibitions, to keep as well temporal

This court may grant prohibitions.

The Authority and Jurisdiction

poral as ecclesiastical courts within their bounds and jurisdiction, without any original or plea depending; for the common law, which in these cases is a prohibition of itself, stands instead of an original. 4 *Inst.* 92. *Vaugh.* 157. 12 *Co.* 108.

Actions from inferior courts may be removed here.

ACTIONS are also removed into this court out of inferior courts of record, by writ of *habeas corpus cum causa*, or *certiorari*; and out of inferior courts not of record, by *pone*, *tolt*, *recordari*, *accedas ad curiam*, or writ of *false judgment*.

May grant a *habeas corpus*.

In term time, it may award a *habeas corpus* by the common law, for any person committed for any cause under *treason* or *felony*, and thereupon discharge him, if it shall clearly appear by the return, that the commitment was against law; as being made by one who had no jurisdiction of the cause, or for a matter for which, by law, no man ought to be punished. *Vaugh.* 154. 2 *Jones* 14. And now it is clear, that this court has a general jurisdiction to grants writs of *habeas corpus*, in all cases. 3 *Wilf.* 172. *Wood's Case.* 1 *And.* 297. *Moor* 839. 1132. 2 *Inst.* 52. a. 1 *Brownl.* 33.

May punish its own officers.

It also hath jurisdiction for the punishment of its own officers and ministers, and all other persons guilty of contempt against the rules and orders of the court.

Jurisdiction is general.

Its jurisdiction is *general*, and extends throughout *England*, and by statute of *Gloucester*, 6 *Ed.* 1. c. 8. *None shall have writs of trespass before justices, unless he swear by his faith that the goods taken away were worth 40s.*

Cannot hold plea under 40s.

Lord Coke in his 2 *Inst.* 311. says, Writs of trespass are here put but for an example, for *debt*, *detinue*, *covenant*, and the like.

And as inferior courts which are not of record cannot hold plea of *debt*, &c. or damages, but under 40s. so the superior courts that are of record cannot hold plea of *debt*, &c. or damages regularly, unless the same amount to 40s. or above, *ibid.* For the wisdom of the common law was, that men should not be troubled for suits of small value in the

the king's courts, but that they should be heard and determined in the county with small charge, and little or no travel or loss of time, for it was there accounted against the dignity and institution of those high courts to hold plea of small or trifling causes; otherwise the law that was instituted for the quiet of man, and for his defence, might be abused to his charge, vexation, and offence. And the maxim of the common law is, *quod placita de catallis, debitis, &c. quæ summum 40s. attingunt vel eam excedunt, secundum legem et consuetudinem Angliæ, sine brevi Regis placitari non debent.* Ibid. 312.

By 43 Eliz. c. 6. it is enacted, That if any personal action be brought in any of her Majesty's courts at Westminster, (not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery,) it shall appear to the judges of the same court, and being so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of 40s. that in every such case the judges or justices before whom such action shall be pursued, shall not award the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to, but less at their discretion.

Actions personal, if plaintiff does not recover 40s. no more costs than the sum recovered (except the title or freehold is in question).

The defendant lived in *Devonshire*; the sale and delivery of the coals by plaintiff was in *Somersetshire*; the debt 1*l.* 2*s.* 6*d.* only; a *capias* was issued; rule to shew cause why all the proceedings should not be set aside, the demand being under 40*s.*; and that the action ought to have been brought in the county, and not in this court; it was shewed for cause, that it was a rule of law, that no suit could be brought in a county court, unless both the defendant resided, and the subject matter arose within its jurisdiction, and cited Stat. W. 1. c. 35. 2 Inst. 229, 230, 231. Dalt. 412. c. 110. Rule disch. *Wylsh v. Troyle*, 2 H. Black. Rep. 29.

Where plaintiff and defendant live in different counties.

If upon a nonsuit in an inferior court 16*s.* is given for costs, by 23 H. 8. c. 15. debt lies for it

Debt lies for 16*s.* costs.

The Authority and Jurisdiction, &c.

in a superior court. *Cro. Eliz.* 96. 1 *Wils.* 316. *Murray v. Wilson*. Stat. 4 *Jac.* 1. c. 3. 1 *Leon.* 316. *case* 344.

Style of the court.

The style of the court is “*Pleas at Westminster before Sir James Eyre Knight, and his companions, justices of our lord the king of the bench, of the term of Saint Michael, in the thirty-fourth year of the reign of our sovereign lord George the third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c.*”

The authority of this court is founded on an original.

The authority of this court in common cases is founded on an *original writ* issuing out of the chancery, being the king’s mandate for them to proceed to determine the cause; for it was a *maxim* among the *Normans* that there should be no proceedings in the king’s court in common pleas without the king’s writ; therefore a writ always issued to warrant this court’s proceedings.

If party privileged.

But where the party is privileged, *as an attorney or other person entitled thereto*, it may hold plea on a *writ of privilege*, which is the *first process* of the court issued against the defendant, to compel him to appear, and make his defence.

Holds plea by bill against attornies, &c.

It also holds plea *by bill*, which is in nature of a *petition* to the court, against any *attorney, officer, or minister*, intitled to *privilege*; the bill expresses either the grievance or wrong which the plaintiff hath suffered by the defendant, or else some fault by him committed against some law or statute of the realm.

Peers, &c. may be sued by original bill.

A *peer, knight, citizen, or burges*s, or other person intitled to privilege of parliament, may be sued in this court by original bill, in manner as directed by the statute 12 & 13 *W.* 3. c. 3. on which a writ of summons may issue, and in default of appearance, a *distringas* may issue to compel him to appear.

Of Actions.

THE primary objects of the law are the *establishment of rights*, and the *prohibition of wrongs*; and to accomplish the *redress of injuries*, courts of justice are instituted in every civil society, in order to protect the *weak* from the insults of the *stronger*; by expounding and enforcing *those laws*, by which *rights* are defined, and *wrongs* prohibited. The remedy therefore principally to be sought by application to these courts of justice, is by civil action, which is the form of a suit given by law, for the recovery of that, which is one's due; or it is a *legal demand of a man's right*; and invented to *preserve men's persons and properties from the violence and injustice of others*: in all instances of an injury being committed, it either *inflicts a punishment* on the offender, or gives a *recompence* to the person injured. The design of entering into society being the protection of our persons and security of our property, men in civil society have a right, and are indeed obliged to apply to the publick for redress, when they are injured: for were they allowed to be their own carvers, or to make reprisals, which they might do in the state of nature, such permission would introduce all that inconvenience which the state of nature did endure, and which government was at first invented to prevent. Hence, therefore, they are obliged to submit to the publick the measure of their damages, and to have recourse to the law and courts of justice, which are appointed to give them redress and ease in their affairs; and this application is what is called bringing an *action*.

Miserable would be the condition of individuals, and dangerous the condition of the state, if there was no certain law, or (which is the same thing) no certain administration of law, to protect individuals or guard the state.

In every action that is brought, the *person complaining* is called the *plaintiff*; and the *person who is called upon to make satisfaction*, is called the *defendant*.

Criminal or civil.

They are either *criminal* or *civil*. *Criminal* which lies for some penalty or punishment in the party sued, be it corporal or pecuniary; therefore called actions penal.

Popular actions.

Popular actions, where a man hath committed a breach of some penal statute; and so called, because it is not given to one specially, but generally to any that will prosecute, as well for himself as the king, and is generally called a *qui tam* action, because it is brought by a person *qui tam pro domino rege, quam pro seipso in hac parte sequitur*. *Dy.* 95. *Lut.* 133.

Party grieved.

Upon every statute made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the statute, or by implication. *2 Inst.* 55. 118. *10 Co.* 75. *b.* And if the penalty be expressly allotted to the party grieved, he alone may sue for it. *2 Inst.* 260.

When statute must be rehearsed.

If an action lies for an offence at common law, and afterwards a statute is made against the same offence, if the action is brought upon the statute, the statute must be rehearsed; otherwise it doth not appear, whether the action be upon the statute, or at common law. *Lut.* 1548. So, if a statute make a new offence, which was not so by the common law, the statute must be recited, as in waste against tenant for life or years. *Ibid.*

But if it extend a remedy.

But if a statute extend a remedy, which was at common law in some particulars, it need not be recited. *Dy.* 83. *b.* 85. *a. b.* As in waste against a tenant in dower or guardian, the statute need not be rehearsed; for here was a prohibition of waste against them at common law. *Ibid. Reg.* 73.

When day, &c. material.

If an act of parliament be recited or pleaded, the *day*, *year*, and *place* of making it must be shewn. It is sufficient that so much of a statute is recited,

recited, as concerns the matter in question; and therefore if it be said *inter alia inactitatum fuit*, it is well. *Plow. 65. a.* If the party recites so much as makes for him, it is sufficient; though he omit a proviso or other clause, that makes against him. *2 Cro. 139. Plow. 105. a.* A material variance is bad. *Lut. 140.* So if he misrecite the title. *2 Salk. 609. Mod. Caf. 62, 3.*

Recital of so much as makes for him sufficient.

Civil actions are divided into *real, personal, and mixed*. *Real*, which concern real property only, are such whereby the plaintiff, or demandant, claims title to any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life: but these actions are now laid aside, being very dilatory and expensive; and a more commodious method is contrived to dispute the title of lands, called an ejectment. *Co. Lit. 284. 2 Inst. 40.*

Civil actions divided.

Personal actions, are *account, assumpsit, covenant, debt, assault, and battery, false imprisonment, case, and trespass.*

Personal.

Mixed actions, are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained; as for instance, ejectment, which intitles the plaintiff not only to restitution for the term of years, but also damages for the wrong: waste not only to recover the land wasted, but also treble damages, which is a personal recompence: and under these three heads may every species of remedy, by suit or action, be comprized.

Mixed actions.

Account lies against the bailiff or receiver to a lord, or others, who by reason of their offices and businesses are to render accompt, but refuse to do it; and by *Stat. 4 Ann. c. 16.* "It may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors, &c. against the other as bailiff for receiving more than his share, their executors, &c." but the more ready way is now to file a bill in equity.

Account.

Assumpsit

Assumpsit.

Assumpsit is an action founded upon a contract, either expressed or implied.

Assumpsit in law.

Assumpsit in law, is a naked contract; or a voluntary promise by word of mouth, by which a man assumes and takes upon him to perform and pay any thing to another. This term comprehends any verbal promise; and is variously expressed by the civilians, according to the nature of the promise; sometimes by *pactum*; sometimes by *promissio*, *pollicitatio*, or *constitutum*.

Promise, what.

A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an *express contract*, as much as any *covenant*; and the *breach* of it is an *equal injury*. The remedy is an *action upon the case*, for what is called an *assumpsit* or *undertaking* of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As if a builder promises, undertakes, or assumes to *A.* that he will build and cover his house within a time limited, and fails to do it; *A.* has an action against the builder for this breach of his *express promise, undertaking, or assumpsit*; and shall recover a *pecuniary satisfaction* for the *injury sustained* by such delay. So also if a debt by simple contract be due, if the debtor promises to pay it and does not, this breach of promise intitles the creditor to his action *on the case*, instead of being driven to an action of *debt*. 4 Rep. 92.

Stat. of frauds.

Some agreements indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by memory of witnesses. To prevent which, the statute of frauds and perjuries, 29 Car. 2. c. 3. enacts, that in the five following cases *no verbal promise* shall be sufficient to ground an action upon, but at the least some *note or memorandum* of it shall be made in *writing*, and signed by the party to be charged therewith: 1.

Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And, lastly, where there is any agreement, that is not to be performed within a year from the making thereof. In all these cases a mere verbal assumpsit is void.

And by same stat. §. 17. No contract for the sale of any goods or merchandize for the price of 10l., or upwards, shall be good, unless the buyer accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain; or there be some note or memorandum in writing of the said bargain made and signed by the parties, or their agents, lawfully qualified. Vide 4 Burr. 2101. 1 Str. 506. 3 Burr. 1921. 1 H. Black. Rep. 63. 6 Br. Cas Parl. 45.—This clause extends only to cases wherein the seller is to deliver the goods immediately, and the buyer immediately to pay for them, that is to contracts executed, not to cases wherein the contract is executory, and the buyer is to be furnished with the goods in future, and then to pay. Vide 1 H. Black. Rep. 20.

Contracts for sale of goods for 10l. or more.

Assumpsit lies in many cases where debt lies, and in many where debt doth not lie. 2 Burr. 1005.

Implied contracts are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law: which extends to all presumptive undertakings or assumpsits; which though never perhaps actually made, yet constantly arise upon this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much

Implied contracts,

much as his labor deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this *implied assumpsit*; wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages, as they think he really merited. This is called an *assumpsit*, on a *quantum meruit*. There is also an *implied assumpsit* or a *quantum valebat*, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Another species
of implied as-
sumpsit.

H. Black. Rep.
1. V. 65.

Another species of *implied assumpsit* is, when one has had and received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies, that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is applicable to almost every case where the defendant has received money, which *ex æquo et bono* he ought to refund. 2 Burr. 1012. See more of this action in my *Inst. Cler. K. B.* 17.

Lies for money
paid by mistake.

It also lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression; or where undue advantage is taken of the plaintiff's situation. 2 Burr. 1012. For money laid out and expended for

for the use of another, the law implying a promise of repayment, and upon an account stated. *Carth. 466.*

Where a husband goes abroad, leaving his wife in this country, who dies in his absence, a third person who voluntarily pays the expences of her funeral (suitable to the rank and fortune of her husband) though without the knowledge of the husband, may recover from him the money so laid out; especially if such third person be the father of the wife. *Jenkins v. Tucker, 1 H. Black. Rep. 90.*

Covenant lies where a man covenants with another, by deed, to do something, and does it not. *Fitz. N. B. 145.* And it lies upon a covenant in any deed indented, or poll. *1 Roll. 517. l. 40.*

But does not lie upon an agreement without deed; but an action on the case. *F. N. B. 145.*

It lies not on a lease made by the committee of a lunatick, for he cannot make a lease at law. *Knipe v. Palmer, 2 Wilf. 130.*

If a man covenants with *B.* to do a personal thing, and dies; his executor or administrator shall have covenant upon it. *F. N. B. 145.*

So where the covenant relates to the inheritance, the heir may have an action upon it. *1 Roll. 520. l. 42.*

So by the common law, upon a covenant in law, the assignee of the estate shall have an action. *Dy. 257. 5 Co. 17. a. Mo. 419. 4 Co. 80. b.*

If a man covenants with *B.* and dies, an action lies against his executor or administrator upon it, though he be not named in the covenant. *1 Roll. 519. l. 35. 40. Cro. Eliz. 553.* So in all cases, an executor is bound by a covenant, if it does not determine by the death of the covenantor. *2 Mod. 269. 1 Roll. 519. l. 33.* So if he covenants for him and his assigns; for an executor or administrator is an assignee. *Mo. 44.* But it does not lie if a covenant be for a personal act of the testator, if the breach be not in his lifetime.

If

Against heirs.

If he covenants for him and his heirs, covenant lies against the heir. *Lut.* 287.

When assignee liable.

If a man covenants to do a thing, which has existence at the time of the demise, and relates to it; the covenant runs with the land, and binds the assignee, though he be not named: as, if he covenants to pay the rent reserved, to repair the house demised. *5 Co* 16. *b.* 24. *b. Cro. Eliz.* 457. 552. *1 Roll* 521. *l.* 37.

Covenant from lessee of tithes for himself or assigns, not to let the farmers have the tithes, runs with the tithes and binds the assignee. *Bally v. Wells* 3 *Wils.* 25.

When assignee not liable.

If lessee covenants to pull down old houses, and build new on the ground in seven years, and does not, but after seven years assigns; assignee is not liable, for the covenant does not run with the land. *St. Saviour's v. Smith*, 3 *Burr.* 1271. For it was broken before the assignment. *1 Salk.* 199.

Debt, in what case it lies.

Debt lies on an obligation, or any other deed or specialty on a judgment, within or after the year after recovery. *43 Ed.* 3. 2. *b.*

So in *C. B.* upon a judgment in *scire facias* upon a recognizance in *B. R.* *Dy.* 306. *a. in marg.*

So in *B. R.* upon a judgment in *C. B.* removed thither by error. *1 Sid.* 236.

So it lies there upon a judgment there after error brought in the exchequer. *1 Sid.* 236. *Lut.* 602. *1 Lev.* 153. *Ray.* 100. Or after error depending in parliament; for only the transcript of the record is removed. *1 Sid.* 236.

But does not lie after *elegit* or *ca. sa. had.*

But it does not lie on a judgment after execution sued by *elegit*, or otherwise, for he has chosen another remedy. *1 Roll.* 601. Nor after defendant taken on *ca. sa.* and discharged by plaintiff's consent. *4 Burr.* 2482. *Vigers v. Aldrich.*

Lies on contract.

Debt lies upon every express contract to pay a sum certain; as if a man covenants or grants to pay. *1 Leo.* 208.

So

So though there be only an implied contract: as if a man be found in arrear upon account. 1 Roll. 598. l. 47.

So against a sheriff for money levied by him upon a *feri facias*; for the law creates a contract for his paying; 1 Roll. 598. l. 10. though the writ be not returned. *Ibid.* l. 15.

So against a sheriff.

Debt will lie on a foreign judgment, and the plaintiff need not shew the ground of the judgment. If he conclude *prout patet per recordum*, that is to be rejected as surplusage, and the defendant cannot plead *nul tiel record*. *Deucl.* 1. Wherever *indebitatus assumpsit* can be maintained, debt will lie. *Ibid.*

Foreign judgment.

It lies for a penalty given by an act of parliament, for the penalty of a by-law, though it is not said by what action it shall be recovered. 1 Roll. 599. l. 25. So for a *nomine pœnæ*. 1 Lev. 110. For a pain or amercement in a court baron. 2 Saund. 66. 1 Lev. 203. So for a fine upon an admittance to a copyhold. 1 Sid. 58. 2 Mod. 230. 3 Mod. 340. *Hard.* 487. So for fees given by a statute to a sheriff. *Mo.* 853. 1 Salk. 209.

Penalty, &c.

But it does not lie on a bill of exchange against the acceptor. *Hard.* 485.

Not on a bill of exchange.

It is said debt will not lie on a promissory note; but in *Rudder v. Price*, 1 H. Black. Rep. 547. which was debt by the payee against the drawer, this objection does not seem to be taken. It was held there, that the action did not lie on a note payable by instalments, till the last day of payment be past.

In debt for goods sold and delivered, the plaintiff declared that the defendant at *Westminster*, in the county of *Middlesex*, was indebted to him in a certain sum for goods sold and delivered, without alledging an exprefs contract and place where such contract was made; upon special demurrer for these causes, the court held the contract and venue well laid. *Emery v. Fell*, *Trin.* 27 Geo. 3. B. R. D. & E. 2 V. 28.

For goods sold how to declare.

It

May recover less than the demand.

It is determined that the plaintiff may recover a less sum than demanded, provided he remits on the roll the residue. 1 *Lord Ray.* 816.

A less sum may be recovered than demanded; and if the demand be for 500*l.* and only 450*l.* specified, it is good.

Debt on simple contract; the declaration demanded 500*l.* and only 450*l.* specified to be due; breach, that defendant had not rendered the 500*l.* On special demurrer the court held, that the demurrer could not be maintained, because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ. *M^r Quillin v. Cox*, 1 *H. Black. Rep.* 249. *Vide* 3 *Mod.* 41.

Assault.

Assault lies where there is an attempt or offer to beat another without touching him; as if one lifts up his cane or his fist in a threatening manner at another; or strikes at him, but misses him. *Finch*, 202. Battery is the unlawful beating of another. The least touching of another person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. 6 *Mod.* 173. 149. *Vent.* 256.

If the plaintiff declares for an assault and battery, he may recover for the assault only, though the declaration cannot be singly for the assault. *Kitch.* 38. *a.* In this action there are no more costs than damages, if under 40*s.* unless the judge certifies the battery proved. 22 & 23 *Car.* 2. *f.* 149.

Imprisonment.

Assault and false imprisonment. This action lies for every confinement of the person without sufficient authority, and is commonly joined to an assault and battery; for every imprisonment includes a battery, and every battery an assault. 2 *Inst.* 598. And to constitute the injury, there are two points requisite: 1. *The detention of the person*; and 2. *The unlawfulness of such detention.* *Ibid.* 46.

Case.

Case. This action lies in a great variety of instances, viz. For affecting a man's reputation or good

good name, by malicious, scandalous, and slanderous words, tending to his damage and derogation^a. On an *assumpsit* or undertaking, where, by any unwholsome practices of another, a man sustains any apparent damage in his vigour or constitution; as by selling him bad provisions or wines^b, by the exercise of a noisome trade which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary^c. For it hath been solemnly resolved that *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Against carriers and others upon the custom of *England*^d: innkeeper for goods stolen in his house while he is a guest^e. For deceits in contracts, bargains, and sales^f; for negligence; keeping a dog accustomed to bite sheep^g; taking or enticing away my servant or apprentice, whereby I lose his service^h; disturbance in the use of a seat in the churchⁱ; for injuries done in commons^k; for malicious prosecutions, conspiracy, escape, and rescous^l; for stopping up a water-course or way; breaking down a party wall; stopping of ancient lights, and for any private nuisance to a man's walls, light, or air^m; against sheriffs for default in executing writsⁿ; for disturbing a parson in taking his tithes, &c. 2 *Cro.* 478.

Trover is a special action on the case, which one man hath against another, who hath in his possession any of his goods by delivery, finding, or otherwise; and sells or makes use of them without his consent, or refuses to deliver them *on demand*; and it is to recover damages to the value of the goods.

The freedom of this action from wager of law, and the less degree of certainty requisite of describing the goods, 1 *Salk.* 654. gave it so considerable advantage over the action of detinue, that by a fiction of law, actions of trover were at length permitted to be brought against any man who had

^a Hob. 138.

^b Roll. Abridg. 95.

^c 11 Hen. 6. 18.

^d 10 Ann. c. 14.

^e Moor. 177.

^f Danv. 173.

^g 1 Vent. 190.

^h 1 Cro. 177.

ⁱ Moor. 907.

^k Style, 168.

^l 1 Salk. 15.

^m 3 Inst. 231.

ⁿ 9 Rep. 54.

ⁿ 1 Cro. 477.

Trover.

The advantage of this action.

in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them *when demanded*. The injury lies in the *conversion*: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be for ever unknown: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner: for which reason such refusal alone is, *prima facie*, sufficient evidence of a conversion. 10 Rep. 56.

Declaration.

It lies for goods tortiously seized by officers of revenue. 3 Atk. 146. The declaration ought to shew the property in the plaintiff, yet if it says that the plaintiff was possessed, omitting *ut de bonis suis propriis*, it is good. Mo. 691. Hardr. 111. If it says that the testator was possessed, and made the plaintiff executor; it is sufficient, without saying, that he was possessed. Lat. 214. 2 Cro. 129. So the declaration must express the goods demanded with convenient certainty; but it is sufficient if there be certainty enough to describe the thing to common understanding. Sho. 144. It ought to alledge a *conversion*, as also the *time* and *place* of the *conversion*; for it is traversable. Cro. Eliz. 97, 8. 78. 1 Brownl. 8. The defendant may plead not guilty or a release. Not guilty *infra sex annos*. Lut. 99. He cannot justify detaining goods till money laid out on them is paid. But it may be deducted in the damages. Str. 657.

This action in form is a fiction.

This action in *form* is a fiction; in *substance*, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant *may* have come lawfully by the possession of the goods. It lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and

by trespass, the plaintiff, if he thinks fit to bring this action, waves the trespass, and admits the possession to have been lawfully gotten. Hence if the defendant delivers the thing upon demand, no damages can be recovered in this action for having taken it. It is an action of tort: and the whole tort consists in the *wrongful conversion*.

Two things are necessary to be proved to entitle the plaintiff to recover; 1st, *property* in the plaintiff; and 2dly, a *wrongful conversion* by the defendant. *Cooper and an. v. Chitty. 1 Burr. 31.*

It is maintainable by the assignees of a bankrupt against the sheriff, who sells the goods of a bankrupt (before taken by him in execution) *after assignment*: for after assignment, they become the property of the assignees, from the *time of the bankruptcy, by relation.* *Ibid.*

Proof.

Maintainable by assignees of a bankrupt.

Where an actual taking of the goods in question is given in evidence, that is sufficient without shewing a demand and refusal; for it is an actual conversion; but when defendant comes to the goods by finding, delivery, or bailment, for example, there an actual demand and refusal must be shewn in order to establish a conversion, unless an *actual conversion* can be proved; in which case it is not necessary to prove a demand. *Breuen v. Roe. Sid. 264. Clay. 112. Beckwith v. Elvey.* For a demand and refusal in such case is sufficient evidence of a conversion. *Cro. Eliz. 495.*

When not necessary to shew a demand.

A demand is not necessary at the suit of assignees of a bankrupt against the sheriff *after sale* previous to the action; for where the goods have been sold, it is held to be a conversion.

When demand not necessary against sheriff.

The owner of goods may maintain this action against any person into whose hands they may have fallen, though the person in whose possession they are found may have *honestly* obtained it, provided it was not by *sale or market overt*, or by *other fair transfer.* *1 Wils. 8. Salk. 283. 1 Leon. 158. 1 Salk. 126.* And where the taking has been *tortious*, an

actual

actual conversion is not necessary to maintain this action. 3 *Wilf.* 146. 5 *Burr.* 2657. 2 *Str.* 943.

Executors may have this action.

Formerly it was held, that executors could not maintain this action, *Sav.* 133; but it is now settled that they may for a conversion of goods in the life-time of their testators, by the equity of the stat. 4 *Ed.* 3. as well as for a conversion in their own times. *Cro. Eliz.* 377. So an administrator. *Sty.* 341. 1 *Str.* 60.

Detinue.

Detinue lies for the recovery of goods in specie, and also damages for the detainer; and it lies against a person who has them either by delivery or finding. But as the defendant in this action may wage his law, *trover* is the action in more common use.

Trespass.

Trespass lies for an injury done by one private man to another; as entering on another man's ground without a lawful authority, and doing some damage however inconsiderable to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; and every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The party must have property in the soil, and actual possession by entry, to be able to maintain it; or, at least, it is requisite that the party have a lease and possession of the *vesture* and *turbage* of the land. *Moor*, 456. 1 *Inst.* 57. 2 *Roll. Abr.* 572. 2 *Lill. Abr.* 596. 2 *Roll. Abr.* 545.

Personal property.

The person in whom the general property in a personal chattel is, may maintain an action of trespass for the taking or injuring thereof by a stranger, although he has never been in the actual possession of it: for a general property does always draw to it a possession in law; which possession is, in the case of a personal chattel, by reason of the transitoriness

of its nature, sufficient to found an action of trespass upon. *Bro. Tresf.* 303. *pl.* 346. *Latch.* 214. 2 *Bulstr.* 268.

If the act in the first instance be unlawful, trespass will lie; but if the act is *prima facie* lawful, and the prejudice to another is not *immediate*, but *consequential*, it must be an action on the case. 1 *Str.* 635. *Ld. Ray.* 272.

Only the person who has the possession in fact of the real property to which an injury has been done, can maintain an action of trespass for the injury: because the gist of an action of trespass, for an injury to either real or personal property, is the being disturbed in the possession of the property. And the having a general property, does not in the case of real property, as it does in the case of personal, draw to it a possession in fact. *Bro. Tr.* *pl.* 38. *pl.* 303. *pl.* 346. 3 *Lev.* 209. *Latch.* 263. 2 *Bulst.* 268. And there must not only be a possession of real property, to which an injury has been done; but it must be a lawful one. For an intruder into land does not gain by the intrusion such a possession as will enable him to maintain an action for a trespass thereupon committed. 2 *Lev.* 147. *Plowd.* 546. 4 *Leon.* 184.

Every one of the parties to a trespass is liable to an action; for there can be no accessory to a trespass. 1 *Lev.* 124. *Bro.* title *Tresf.* 113.

An action it is said does not lie before a cause of action accrued, but if the cause of action accrued before the bill filed it is good, though the writ issued before. *Cowper's Rep.* 454. 2 *Burr.* 960. But this means where a copy of process is served. A man cannot join several and distinct causes of action in the same count. *Com. Dig.* 108.

In personal actions, if two causes of action are of the same nature, they may be put in one action. *Two causes of action.* *Th. D. l. 8. c. 26. s. 1, 2.*

Whenever the same process and judgment are in two counts they may be joined, otherwise they cannot. 2 *Wils.* 321. Debt on a judgment and a mutual

tuatus may be joined; so may debt on a *bond* and a *mutuatus*, although there be different pleas required, because there is the same process and judgment. 1 *Wils.* 248. Debt and detinue may be joined. *Bro. pl.* 97. Debt upon an amercement and a *mutuatus* may be joined. 1 *Wils.* 248. The duke of *Bedford v. Alcock*. Case for a misfeasance and negligence against a common carrier may be joined with trover. *Dickson v. Clifton*, 2 *Wils.* 319.

For whom and against whom an Action will lie.

AS the law grants redress for all injuries, and gives a remedy for every kind of right, so it is open to all kinds of persons, and none are excluded from bringing an action, except on account of their crimes, or their country; as men attainted of treason or felony, persons outlawed or excommunicated, convict in *præmunire*, alien enemies professed in orders of the papal religion, as friars, monks, &c. (unless they have attained a pardon), infants, feme coverts (unless by special custom), or persons not in *rerum natura*; but executors or persons outlawed have a right to sue in right of their testator or intestate. 1 *Inst.* 128. In life, liberty, and estate, every one (who has not forfeited them) has a property and right; and if they are violated, the law gives an action to redress the wrong, and punish the wrong doer. *Vaug.* 337.

But care must be taken how such actions are brought, as if an infant is plaintiff, he must sue by his next friend or guardian (*Roll. Abr.* 287), unless he sue with others as executor, and then he may sue by attorney, for all of them together represent the testator. *Ibid.* 288. If an infant is sued, he must appear by a guardian; if not, the plaintiff may move the court to have one appointed. 2 *Inst.* 26. If an idiot sue or be sued, he must do it in person. A married woman must sue with her husband, and in all cases where they are both sued (although the husband may answer alone), yet the wife shall never be forced to answer without her husband (except she be a sole merchant, *i. e.* when she carries on a sole and separate trade, which is by the custom of *London* only). 10 *Mod.* 6. 1 *Inst.* 135. Wherever the suit will survive to the wife she must join in the action. 1 *Wils.* 224. *Dunstan & ux.*

Care must be taken how actions are brought.

Married woman.

Survivors,

v. *Burwell and others*. Or where the debt is due to the *feme dum sola*, both must join. *Moor*, 422. If baron is possessed of tithes in right of the *feme*, they must join in debt for not setting them forth, because the *feme* is the proprietor. *Cro. Eliz.* 608. 613. If the action is brought for the labour of the wife only, she may join in the action. 2 *Sid.* 128. *Cro. Jac.* 77. But declaration must state it to be done by the wife. 2 *Wils.* 424. The dippers at *Tunbridge Wells* all joined with their husbands, and held well. 2 *Wils.* 414. *Weller and others v. Baker*.

Executors.

Executors, when they bring an action, must *all* be named; but when an action is brought against them, it must be only against *such of them as do administer*. 1 *Roll. Abr.* 924. *Carth.* 124.

Executors may sue before probate, but cannot declare; but administrator cannot sue before administration.

They may sue before probate, but cannot declare till probate granted, for when he comes to declare he must produce his letters testamentary: But an administrator cannot bring an action till administration granted, for the power of the first is derived from the will, that of the latter from the ordinary. *Salk.* 302. 1 *Roll. Abr.* 917. If probate be lost he may declare on an exemplification. 1 *Str.* 440. If there are two executors, one under age, and the other proves the will, and hath administration *durante minore, &c.* he may sue solely. But where both are of full age, though the will be proved by one only, the action must be brought in both their names. 2 *Lev.* 240. *Colborne v. Wright*. 2 *Jon.* 119. *Raym.* 198.

Joint tenants.

Also, if two men have lands and goods together in joint tenancy, and be wronged in them, they must sue jointly. *Co. Litt.* 180. Tenants in common ought to join in actions personal, but not real; and in assize and slander of title, they ought to sever. Divers persons may have an action of trespass jointly for goods taken or the like; but of battery, or such like personal trespass, the action ought to be single; if one trespass be done by di-

Tenants in common.

vers,

vers, the plaintiff may make it joint, or several, as he pleases; and yet two that join in a trespass, do so make one trespasser, that one of them is answerable for the other; and if they be sued in one action, they may sever in pleas and issues, and a release to one is a release to all. Also the jury must assess damages for all, but there shall be but one satisfaction; and where a joint action doth lie against several persons, and some of their names are known, and some are not, the action may be brought against them that are known by their particular names; and you may declare against them *simul cum aliis*, &c. 2 *Lill. Abr.* 469. *Comb.* 260.

Until the time of *Ed. 1.* the king might have been sued in all actions, as a common person. 22 *Ed. 3.* 3. *Th. D. l. 4. c. 1. f. 3.* But now none can have an action against the king; but one shall be put to him to sue by petition. The queen may be sued without the king her husband in all actions, for she is a person sole by the common law. *Th. D. l. 4. c. 2. f. 2.* So the queen dowager without suing to her by petition. *Ibid. f. 3.* So the prince of *Wales* may be sued by original writ. *Ibid. f. 4.* Every subject of the king, ecclesiastical or temporal, man or woman, villain or free. 2 *Inst.* 55. 6. Though he be deaf, dumb, or an idiot. *Th. D. l. 4. c. 2. f. 4.* Though he be *non compos mentis*, lunatic. *Ibid.* Though he be committed or attainted. *Ibid. Ney. 1.* But though a person attainted is liable to civil suits, yet he ought not to be charged but by leave of the court, or of a judge at his chambers. *Foster, Cr. L. 61. 1 Wilson, 217.* Though he be outlawed, excommunicated, or within age. 2 *Inst.* 56. So every body politic may be sued, or an alien born.

Who may be
sued.

Within what time Actions are to be brought.

Limitation of suits.

THE limitation of suits is founded in public convenience; and attended with so much utility, that courts of equity adopt the statutes made for that purpose, as a positive rule; and apply it by the parity of reason, to cases not within it.

By the 32 *H. 8. c. 2.* “No person shall have
“a writ of right of the possession of his ancestor,
“but within *sixty years*, nor of his own but within
“*thirty years.*”

Claim.

And, *N. B.* a claim or entry, to prevent the statute, must be upon the land, unless there shall be some special reason to the contrary. *Salk. 205. 2 Str. 1086.*

Penal actions
qui tam, &c.

By the 31 *Eliz. c. 5. §. 5.* All actions, &c. whereby the forfeiture is or shall be limited to the queen, her heirs or successors, only, shall be brought *within two years* after the offence committed. And that all actions, &c. for any forfeiture upon any penal statute, except the statutes of tillage, the benefit whereof is or shall be limited to the queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be brought by any person that may lawfully pursue for the same, within *one year* next after the offence committed; and in default of such pursuit, that then the same shall be brought for the queen within *two years* after that year ended: and if any action or information for any offence against any penal statute made or to be made, except the statute of tillage, shall be brought after the time before limited, then the same shall be void.

Proviso.

Provided, that where any information, indictment, or other suit, is or shall be limited by any statute

statute penal, to be had or brought within a shorter time, that in every such case, the action, &c. or other suit, shall be brought within the time limited by such statute. *Sec. 6.*

By 21 *Jac. 1. c. 4.* No officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration, grounded on any penal statute (being within the statute of the 21 *Jac.*) until the informer or relator hath first taken a corporal oath before some of the judges of the court, that he believes in his conscience the offence was committed within a year before the information or suit, within the county where the said information or suit was commenced.

No officer shall receive or file any information, &c. unless oath be made by the party, &c.

An affidavit of the cause of action, accruing within a year, need not be filed in an action on the statute of usury. *Str. 1081. French v. Coxon.*

On stat. of usury no affidavit.

In the construction of these statutes, it hath been holden, 1. That the 21 *Jac. 1. c. 4.* does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby. *Salk. 372. pl. 13. 5 Mod. 125. Str. 1081.* 2. That if an offence, prohibited by any penal statute, be also an offence at common law; the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes. *Hob. 270. 4 Mod. 144.* 3. That if a suit on any penal statute, be brought after the time limited, the defendant need not plead the statute, but may take advantage of it under the general issue. *Show. 353.* 4. That the party grieved is not within the restraint of these statutes, but may sue in the same manner as before. *Cro. Eliz. 45. Noy, 71. 3 Leon. 237. Show. 354. Carth. 33.*

Construction.

An action of debt was brought on the 9 *Ann. 14.* by a common informer against Sir Thomas Frederick for winning 525l. of G. L. at cards. The money was lost and paid, 11 *March 1757*, and the original not sued out till *Mich. 1762.* This court held it a case within 31 *El.* though the action given in

in the first instance was to the party grieved, and after to the common informer alone; for such action would have been within 7 H. 8.; and the 31 Eliz. was made to narrow the time given by that statute, and therefore could never mean to leave any actions unrestrained in time. The latter part of the clause must therefore be construed to extend to them. *Lookup v. Sir Thomas Frederick. Bul. Nis. Pri. 190.*

Writs of formedon shall be sued within 20 years.

By *stat. 21 Jac. 1. c. 16.* All writs of formedon shall be sued within *twenty years* next after the title and cause of action first descended or fallen; provided, if the person entitled to such writ be at the time of the said right first descended or fallen, within the age of one and twenty years, *feme covert, non compos mentis, imprisoned, or beyond the seas*, then such person and his heirs may, notwithstanding the said *twenty years* be expired, bring his action, or make his entry, as he might have done before this act: so as such person, or his heirs, shall, within *ten years* next after his full age, discoverture, &c. take benefit of, and sue forth the same, and at no time after the said *ten years*. An ejectment must be brought within twenty years. *Sid. 432.*

Ejectment.

Construction of the statute.

In the construction of this statute it hath been holden, that the possession of one joint tenant is the possession of the other, so far as to prevent this statute. 1 *Salk. 285.* That a claim of entry to prevent the statute of limitations must be upon the land, unless there be some special reason to the contrary. 1 *Salk. 205.* 2 *Str. 1086.* That if a person be barred of his formedon, he is not thereby hindered to pursue his right of entry which afterwards accrues to him, no more than a person who has several remedies, and discharges one of them, is excluded thereby from pursuing the others. 1 *Lutw. 781.* 1 *Salk. 339.* 2 *Salk. 422.*

Tenants in common.

That if one tenant in common receives the whole profits for twenty years or more, yet this does not bar his companion; for the statute of limitations never

never runs against a man, but where he is actually ousted or disseised. 1 Salk. 423.

Copyholds are within the statute, because it is an *Copyholds.* act made for the preservation of the public quiet, and no ways tending to the prejudice of the lord or tenant. *Moor*, 410.

By *Stat. 21 Jac. 1. c. 16. s. 3.* All actions of *Limitations of* trespass, *quare clausum fregit*, *detinue*, action for *personal actions.* *trover*, and *replevin* for taking away of goods and cattle, all actions of *account*, and upon the *case* (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants), all actions of *debt*, grounded upon any *lending* or *contract* without *specialty*; all actions of *debt* for arrearages of *rent*, and all actions of *assault*, menace, battery, *wounding*, and *imprisonment*, or any of them, which shall be sued or brought, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say) the said actions upon the *case* (other than for slander), and the said actions for *account*, and the said actions for *trespass*, *debt*, *detinue*, and *replevin* for goods or cattle, and the said action of *trespass*, *quare clausum fregit*, within *six years next after the cause of such actions or suit*, and not after; and the said actions of *trespass*, of *assault*, *battery*, *wounding*, *imprisonment*, *Trespass, &c.* or any of them, within *four years next after the cause of such actions or suit*, and not after; and the said action upon the *case* for *words*, within two years *Words.* next after the *words spoken*, and not after,

That if in any the said actions judgment be given for the plaintiff, and reversed by error, or a verdict pass for the plaintiff, and on matter alledged in arrest of judgment, the judgment to be given against the plaintiff, that he take nothing by his *plaint*, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein *be outlawed*, and shall *after reverse the outlawry*, that in all such cases the party plaintiff, his heirs, &c. as the case shall require, may commence a new *action* *Their limitation after judgment of outlawry reversed.*

Within what time Actions

tion or suit, from time to time within a year after such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, and not after. *s. 4.*

Infants, feme covert, &c. excepted.

That if any person or persons, that is or shall be intitled to any such action or trespass, &c. be at the time of any such cause of action given or accrued, fallen, or come within the age of twenty-one years, *feme covert, non compos mentis, imprisoned, or beyond the seas*, that then such person shall be at liberty to bring the same, so as they take the same within such times as are before limited, after their coming to, or being of full age, as other persons having no such impediment, should have done.

When the statute begins to run.

If the plaintiff is in *England* when the cause of action accrues, the time of limitation begins to run; so that if he, (or if he dies abroad,) his executor or administrator do not sue within six years, they are barred by the statute. *1 Wils. 134. Smith executor v. Hill executor.* If the plaintiff is a foreigner, and doth not come to *England* in fifty years, he still hath six years after his coming into *England* to bring his action; and if he never comes to *England* himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. *Per Cur. Strithers v. Græme, esq. 3 Wils. 144.* While any of the disabilities mentioned in the statute of limitations continue, the party may, but is not obliged to commence his action: for the statute doth not run while any of those disabilities continue. *Ibid.* The statute does not begin to run against a foreigner, till he comes into *England*.

What actions are within the statute.

With respect to merchants accounts, it hath been determined, that they mean such accounts as are open and current only; and that therefore, if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if he to whom the money is due, does not bring his action within the time limited, he is barred

barred by the above statute. 2 *Mod.* 312. 2 *Saun.* 124. *Lev.* 287. *Vent.* 90. 2 *Vern.* 456.

Action on a bond is not within the statute; yet the practice is, that where an action is brought on a bond of twenty years standing, and on which no interest has been paid for that time, the defendant may plead *solvit ad diem*, and it will be presumptive proof of the payment, if the plaintiff does not prove either the payment of the interest, or a demand precedent. In chancery, an obligee on a bond was refused any relief. *Chan. Rep.* 78. 88. 106.

Action on bond not.

Debt on the 6 *Ed.* 6. for tithes, or on an award for a fine of a copyhold, rent on an indenture of lease, or for an escape, are not within the statute.

Debt for tithes &c. not.

1 *Sid.* 305. 1 *Saun.* 33. 37. 1 *Lev.* 273. Nor can the statute be pleaded by any sheriff to an action brought against him for money levied on a *feri facias*, because the action is founded in *maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute; and because it is grounded on the statute, 1 *R.* 2. c. 12. which first gave an action of debt for an escape, there being no remedy for creditors before, but by action on the case, *Saund.* 37. 1 *Lev.* 191. 2 *Keb.* 93. Nor can it be pleaded to an action on a judgment. 1 *Mod.* 205. 212. A charity is not bound by length of time, 2 *Vern.* 399; a legacy is not within the statute, 1 *Vern.* 256; nor a mortgage. 1 *Chan. Cases*, 102.

Sheriff cannot plead the statute

For words. This does not extend to *scandalum magnatum*, nor to cases where the special damage is the gift of the action; but where the words of themselves are actionable, special damage will not take them out of the statute. 1 *Sid.* 95. *Saund.* 61. Nor to actions for slander of title, for that is not properly slander, but a cause of damage; and the slander intended by the statute is to the person. *Cro. Car.* 141. *Palm.* 530. *Jones*, 196.

Scan. mag. not within the statute.

Slander of title not.

If words are of themselves actionable, they are within the statute.

If the words of themselves are *actionable*, without the necessity of *alleging special damages*, although a loss ensues, yet in this case the statute of limitations is a good bar; but if the words, at the time of the speaking them, are *not actionable*, but a subsequent loss ensues, which intitles the plaintiff to his action, in such case the statute is no bar. *Sid. 95. Ray. 61. 3 Mod. 111.* As for calling a woman a *whore*, by which she lost her marriage seven years afterwards, the statute is no bar; for it is not the words, but the *special damage*, which is the cause of action in this case. *Sid. 95. Salk. 206. pl. 5.* And it was incumbent on the plaintiff to prove the special damage, otherwise the action would not have lain for the words.

Trespass *per quod servitium amisit*, is not within the statute.

Trespass and assault. If trespass be brought for beating a servant *per quod servitium amisit*, this is not such an action as is within the statute, being founded on the special damage. *Salk. 206.*

Actions on promissory notes.

By 3 & 4 *Ann. c. 9.* Actions on promissory notes are to be brought within the time appointed for actions upon the case.

Suits in the Admiralty.

By 4 *Ann. c. 16.* All suits in the admiralty for seamen's wages are to be commenced in *six years* after the cause of action.

The six years to be computed from the time of payment given by the bill.

Where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the loan was advanced; the statute beginning to operate only from the time when the money was to be repaid, *i. e.* when the bill became due. *Whitterseim v. C. D. of Carlisle. 1 H. Black. Rep. 631. 3 Bac. 602.* Though on a mere loan of money the time of limitation might commence from the date of the loan, yet where the money was lent on a special contract for repayment, that ought to fix the period of the limitation. *Cur.*

When

When an action is limited by a statute to be commenced within a certain time, a *capias ad respondendum*, sued out within that time, may be produced in evidence at the trial, to prove that the action was commenced in due time. 3 *Will.* 465. *Leader v. Moxon*. But if the writ was not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited. *Morris and Harwood, M. 3 Geo. 3. Bull. Nisi Prius, 135.*

A *capias* being produced is sufficient to shew that the action is brought in due time.

In the case of executors; if the six years be not elapsed at the time of the testator's death, if the executor takes out proper process within the year, it will save the bar by reason of the limitation. *Bull. 150.*

Executors.

Of the Proceedings in this Court.

I HAVE already observed, that this court cannot hold plea in ordinary cases, without the king's *original writ*; therefore the plaintiff, in a personal action, was, in the first instance, obliged to make out a *præcipe* for the same, and apply to the curfitor of the county in which his cause of action arose, who made it out returnable in this court.

Original writ.

The original is a mandatory letter from the king, in parchment, sealed with his great seal, and directed to the sheriff of the county, requiring him to command the party accused either to do justice to the complainant, or else appear in court, and answer the accusation.

These writs are either *optional* or *peremptory*, and called by the names of a *præcipe quod reddat*, or a *si te fecerit securum*, and, for shortness, a *pone*.

Præcipe quod reddat.

The *præcipe quod reddat* is, in the alternative, commanding the defendant to do the thing required, or shew the reason wherefore he hath not done it: the use of this writ is, where something certain is demanded by the plaintiff; as to restore the possession of his land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like; in all which cases the writ is drawn up in the form of a *præcipe* or *command*, to do thus, or shew cause to the contrary; giving the defendant his choice, to redress the injury, or stand the suit.

Si te fecerit securum.

The *si te fecerit securum*, directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. This writ is in use where nothing specifically is demanded, but only a satisfaction in general. Such

are writs of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim.

This security is common to both writs, and formerly were responsible persons taken by the sheriff, to answer for the plaintiff, if he failed in the action, to such amercement as the court should set on him for raising a false accusation; the sufficiency of whom the sheriff was liable to the king.

On receipt of either of these writs, the sheriff made out his summons to the defendant, directed to his *bailiffs*, called *summoners*, who either summoned him personally, or left the same at his house or place of abode.

On this summons the defendant either appeared, or *essoigned*, or made default: if he appeared, the plaintiff then proceeded against him by delivering a declaration. If he *essoigned* (that is, sent his excuse by a servant for not appearing), the excuse was to be sent on the day the writ was returnable; for if he omitted that day, an exception might be entered the next day to his *non-appearance*, and the plaintiff might have an order that the defendant's *essoign* or *excuse* be not received; from this *exception* so taken and entered, the second day after the return of the writ, was called the day of *exception*: the third day the sheriff returned his writ into court, which was delivered into the custody of the *custos brevium*, and from thence, this day was called the day of *returna brevium*; then it was, this court was seized of the cause by the possession of the writ. The fourth day was called the day of *appearance*, or *dies amoris*, which was the time granted *ex gratia*, for the party to appear: "*for our sturdy ancestors held it beneath the condition of a freeman to be obliged to appear, or to do any other act at the precise time appointed or required.*" If the defendant did not then appear, the plaintiff offered

ferred himself, and the filacer recorded his appearance, and the sheriff's return, that he either summoned the defendant, or that the defendant had nothing by which he could be summoned: if the sheriff returned *summonire feci*, then was awarded an attachment and distress infinite, if the action was in debt; but in trespass, because there was a fine to the king, the king's process (which was a *capias*) was awarded, or a distress as the court thought proper; but if the sheriff returned, that the defendant had nothing by which he could be summoned, then the *capias* was awarded even in debt, by Stat. 25 Ed. 3. c. 17. and in actions on the case by the 19 H. 7. c. 9. If the defendant could not be arrested on the *capias*, the *capias* being returned *non est inventus*, and filed with the *custos brevium*, the plaintiff, upon application, might have an *alias* and *pluries*; and upon the like return, the plaintiff might sue the defendant to outlawry, by which he forfeited all his goods, lost the profits of his land, and was liable, if taken, to be imprisoned.

How proceedings were before the *capias* was given.

Before the Stat. 19 H. 7. c. 9. which allowed the writ of *capias ad respondendum* in actions on the case, a practice was introduced into this court, of commencing the suit by an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*, which, by the old common law, subjected the defendant's person to be arrested by writ of *capias*: and then afterwards, by connivance of the court, the plaintiff might proceed to prosecute for other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expence, in suing out a *special original* adapted to the particular injury) still continues in almost all cases (except in actions of debt), for if the defendant appeared at the return of the writ, or on the *distringas*, the plaintiff might declare against him in any action he should think proper, and after judgment, purchase a *special original* to warrant the proceeding, which would prevent the judgment being arrested or reversed.

This

This was the regular and orderly mode of proceeding; but now the usual practice is, to sue out a *capias* in the first instance, upon a supposed return by the sheriff of the original. The present practice.

Originally, if the sheriff found the defendant, he was obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For not having obeyed the original summons, he had shewn a contempt of the court, and was no longer to be trusted at large; but when the summons fell into disuse, and the *capias* became the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases, by the gradual indulgence of the courts (at length authorised by *Stat. 12 Geo. 1. c. 29*, amended by the *5 Geo. 2. c. 27*, and made perpetual by *Stat. 21 Geo. 2. c. 3*), the defendant is now only to be personally served with a true copy of the writ, with notice in writing directed to him, to appear by his attorney in court to defend the action; which in effect reduces it to the summons of the sheriff. And if the defendant thinks proper to appear at the return, he enters the same with the proper filacer; but if he does not appear on the return day of the writ, or within eight days after, the plaintiff may, upon an affidavit made of the service of a true copy of such writ and notice, cause an appearance to be entered for him, pursuant to the Statute of the *12 Geo. 1. c. 29. sect. 1.* and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then in order to arrest the defendant, and make him put in substantial sureties for his appearance, called *special bail*, it is required by *Stat. 13 Car. 2. st. 2. c. 2.* that the true cause of action should be expressed in the body of the writ; as, "*that the said defendant may answer to the plaintiff of a plea of trespass: and also,*"

If affidavit be made.

ac-etiam, "may answer him, according to the custom of the court, in a certain plea of trespass on the case, upon promises, to his damage of 20l."

This statute had like to have ousted the king's bench of all its jurisdiction over civil injuries without force: for, as the *bill of Middlesex* was framed for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts: but to remedy this inconvenience, the officers devised the method of adding the clause of *ac-etiam* to the usual complaint of trespass. In imitation of which, *Lord Chief Justice North*, a few years afterwards, in order to save the suitors of this court the trouble and expence of suing out *special originals*, directed the clause of *ac-etiam* also to be inserted in the *capias*.

Sum marked on writ.

The sum sworn to by the plaintiff is marked upon the back of the writ; and the sheriff, or his officer the bailiff, is then obliged actually to arrest or take into custody the body of the defendant, and having so done, to return the writ (when called on by a rule for that purpose), with a *cepi corpus* indorsed thereon.

Bail bond.

When the defendant is arrested, he must either go to prison for safe custody, or put in *special bail* to the sheriff to appear in court at the return; which is effected by entering into a bond to the sheriff in double the sum sworn to, with one or more sureties, who are to be substantial and responsible men, to insure the defendant's appearance at the return of the writ; which obligation is called a *bail bond*. *Vide Stat. 12 Geo. 2. c. 29.*

Bail above in London or Westminster.

Within four days exclusive of the appearance day of the return of the writ, the defendant must put in bail above, that is, enter into a recognizance (if they live in London or Westminster, or within ten miles thereof) before one of the justices of this court (the defendant not being present), in double the sum sworn to by the plaintiff, "whereby they do severally acknowledge to owe unto the plaintiff the sum of £. 20 a piece, to be levied upon their several

Recognizance of bail.

"several goods and chattels, lands and tenements, upon condition, that if the defendant be condemned in the said action, he shall pay the condemnation, or render himself a prisoner to the Fleet for the same; and if he fail so to do, they undertake to do it for him."
R. 5 W. & M.

But if the defendant be present, then he likewise enters into recognizance with the bail, which is a great ease to them, because they only become bound with him in the sum sworn to. If defendant be present.

If the cognizors live above ten miles from *London* or *Westminster*, commissioners are appointed in every county beyond that distance, to prevent the expence of travelling to town, under the *Stat. of 4 & 5 W. & M. c. 4.* to take such recognizances, and after they are so taken, an affidavit is made by the attorney or his clerk, being present, of the due taking thereof, which, with the bail-piece, is transmitted to one of the justices of this court to be allowed, who on reading the same, signs his *allocatur* thereon; they are then taken to the filacer and filed with him, and unless the plaintiff's attorney excepts against them within *twenty days*, such bail become *absolute*, for before the *twenty days* are expired, the bail are only *conditional*. *R. 5 W. & M.* Bail in the country.

But if the plaintiff or his attorney except against them, then, if they live in *London* or *Westminster*, or within *ten miles* from thence, the bail must appear in open court for that purpose (unless the attorney consent to accept a justification at a judge's chambers). If they live above ten miles, then they may justify themselves by affidavit sworn before the commissioner who took such recognizance of bail, and which is mostly taken at the same time to prevent trouble and expence. Exception;

If the bail to the sheriff be not put in due time, and they are *responsible persons*, the plaintiff may take an assignment from the sheriff of the bail bond (under the *Stat. 4 & 5 Ann. c. 16.*), and bring an action thereupon against the sheriff's bail. But if Assignment of the bail bond,

the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff, by calling upon him by a rule, to return the writ (if not already done), and afterwards by another rule to bring in the body of the defendant. And, if the sheriff does not then cause *sufficient bail* to be perfected within the time limited by the rule, he will himself be responsible to the plaintiff.

Thus much for the process, which is only meant to bring the defendant into court, in order to contest the suit, and abide the determination of the law. When he appears in person as a prisoner, or by attorney, then follow the pleadings between the parties, which are the mutual altercations between them, and at present are set down and delivered to the attornies in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce*, in court, and then minuted down by the prothonotaries.

Declaration.

The first of these is the declaration, *narratio*, or *count*, antiently called the *tale*; in which the plaintiff sets forth his cause of complaint at length; being an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of *time* and *place*, when and where the injury was committed.

When the defendant is brought into court, upon a supposed trespass, in order to give the court a jurisdiction, which has been already mentioned, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper, unless he has held him to special bail by a *special ac-etiam*, which the plaintiff is then bound to pursue.

Local actions.

In *local actions*, where *possession of land* is to be recovered, or damages for *actual trespass*, or for *waste*, &c. affecting land; the plaintiff must lay his declaration, or declare his injury to have happened in the very county and place that it did happen; but in *transitory actions*, for injuries that might have happened any where, as *debt*, *detinue*, *slander*, and the like, the plaintiff may declare in what county

Transitory.

county he pleases, and then the trial must be in that county in which the declaration is laid; though if the defendant will make affidavit, *that the cause of action, if any, arose not in that, but in another county, the court will direct a change of the venue or vicine* (that is, the *vicinia* or neighbourhood in which the injury was declared to be done), and will oblige the plaintiff to declare in the proper county. For the Statute 6 Ric. 2. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, impowered them to change the *venue*, if required, and not insist rigidly on abating the writ; which practice began in the reign of James the First, 2 Salk. 670.; and this power is discretionally exercised, so as not to cause but prevent, a defect of justice. Therefore the court will not change the *venue* to any of the *four northern counties*, previous to the spring circuit; because there the assizes are holden only once a year, at the time of the summer circuit: and it will sometimes remove the *venue* from the proper jurisdiction (especially of the narrow and limited kind) upon a suggestion duly supported, *that a fair and impartial trial cannot be had therein*.

It is generally usual in actions upon the case, to set forth several cases, by different counts in the same declaration (so that if the plaintiff fails in the proof of one, he may succeed in another); and to conclude with declaring, that the defendant had refused to fulfil any of the agreements, whereby he has received damage to such a value. If he proves the case laid in any one of the counts, though he fails in the rest, he shall recover proportionable damages. The declaration always concludes with these words, "*and therefore he brings his suit, &c.*" By which words suit or *seito* (*a sequendo*) were antiently understood the witnesses or followers of the plaintiff, *Seld. on Fortesc. c. 21.*; for, in former times, the law would not put the defendant to the trouble of answering the charge, till the plaintiff had

In actions on the case, the case is set forth by different counts.

had made out at least a probable case. *Bract.* 400. *Fl. b. 2. c. 6.*

Nonpros, when
it may be signed.

If the plaintiff neglects to deliver a declaration at the end of the ensuing term *after the process is returnable*, and the defendant having entered his appearance with the proper officer *as of that term in which the process is returnable*, and given a rule to declare in the proper office, and demanded a declaration, the defendant may, any time in the vacation of such ensuing term, *after the rule for declaring is out*, sign his *nonpros*; and if he be guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow his remedy as he ought to do; and thereupon he is also said to be *nonprossed*. And for thus deserting his complaint, after making a *false claim*, he shall not only pay costs to the defendant, but is liable to be amerced to the king. *Vide R. H. 9 Ann. s. 3.*

Defence.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant, within the time allowed him by the rules of the court, to make his defence, and put in a plea; or else the plaintiff will at once recover judgment by default, or *nihil dicit* of the defendant; because, having deserted the court, he ceases to oppose the plaintiff's demand, and so submits that judgment be given against him. But before the defendant makes his defence, he may crave oyer, in writing of the bond or other specialty upon which the action is brought; that is, to hear it read to him; the generality of defendants, in the times of ancient simplicity, being supposed incapable to read it themselves: whereupon the plaintiff's attorney delivers a copy thereof, to enable the defendant to plead such plea as his counsel thinks proper. *R. M. 1 Geo. 2.* But the court never make any rule for *oyer of originals*, which are matters of record. *Barnes, 340.*

Oyer of the
bond, &c.

Impar lance
when intitled to.

If the plaintiff does not deliver his declaration in due time, the defendant is intitled to an *impar lance* of

or *licentia loquendi*, which seems to have arisen from a notion of religion mentioned in *Saint Matthew*, ch. v. v. 25. in obedience to that precept of the gospel "agree with thy adversary quickly, whilst thou art in the way with him." They looked upon the plaintiff, at the time of declaring, to be in his way towards judgment; and therefore, since the defendant was ordered by the precepts of religion to agree with him, that there was a necessity to give time for that purpose; this imparlance was entered when the writ was general, because the defendant did not know how to agree with the plaintiff till he had heard his full demand: and therefore then the defendant might have agreed with him in the country whilst he was in the way, according to the letter of the text, in which case there was no need of a *libertas loquendi* to be entered upon the roll. *Glib. C. P.* 42-3.

Imparlances are either *general* or *special*; *general* are granted of course, because the plaintiff has not proceeded in due time by delivering his declaration; *special* with a saving of all *exceptions* to the writ or count, which may be granted by the prothonotaries; or they may be granted still more special, with a saving of all exceptions whatsoever, which is granted at the discretion of the court. *12 Mod.* 529.

Imparlance general or special.

Defence, in its true legal sense, denotes an opposing or denial of the truth or validity of the complaint, answering to the *contestatio litis* of the civilians. It is a general assertion which the defendant makes immediately after the count or declaration, that the plaintiff hath no ground of action; which assertion is afterwards extended and maintained in his plea. And formerly the courts were very nice and curious with respect to the nature of the defence, so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover judgment, *Co. Lit.* 127.; for a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the

Defence.

the competency of the plaintiff, and the cognizance of the court were allowed. By defending the *force and injury*, the defendant waived all pleas of *misnomer*; by defending the damages, "*all exceptions to the person of the plaintiff*," and by defending either one or the other, "*when and where it should behove him*," he acknowledged the jurisdiction of the court. But of late years these niceties have been very deservedly discountenanced. *Salk. 217.*

Two sorts of pleas.

Pleas are of two sorts; *dilatory pleas*, and *pleas to the action*. *Dilatory pleas* are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury. *Pleas to the action* are such as dispute the very cause of suit.

Pleas in abatement.

Dilatory pleas are, 1. *To the jurisdiction of the court*: alledging, that it ought not to hold plea of the injury, it arising in *Wales*, or *beyond sea*; or because the land in question is of *ancient demesne*, and ought only to be demanded in the lord's court, &c. 2. *To the disability of the plaintiff*, by reason whereof he is incapable to commence or continue the suit; as, that he is an *alien enemy*, *outlawed*, *excommunicated*, *attainted of treason or felony*, under a *præmunire*, not in *rerum natura* (being only a fictitious person), an *infant*, *feme covert*, or a *monk professed*. 3. *In abatement*: which is either of the *writ* or the *count*, for some defect in one of them, as by misnaming the defendant, which is called a *misnomer*; or other want of form in any material respect. Or, that it may be, that the plaintiff is dead; for the death of either party before verdict, is at once an abatement of the suit. And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as *trespass*, *battery*, and *slander*, the rule is, that *actio personalis moritur cum persona*, 4 *Inst.* 315; and it shall never be revived either by or against the executors or other representatives. *Ibid.* *Cowper's Rep.* 375. *Latch.* 168. 1 *Andr.* 243. *Jon.* 174.

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The defendant, generally speaking, can have but one plea in abatement, and this is the natural order of pleading; because, by the order before mentioned, each subsequent plea admits the former; as when he pleads to the person of the plaintiff, he admits the jurisdiction of the court; for it would be nugatory to plead any thing in that court that has no jurisdiction in the case. When he pleads to the count, he allows that the plaintiff is able to come into that court to implead him, and he may there be properly impleaded; but in pleading to the count, he does not admit the writ to be good; yet if the count be vicious, the writ is consequently destroyed; for though the writ in itself may be good, yet it is not pursued: but in pleading to the writ, he admits the form of the count, because by any objections to the form of the writ, he allows the count to be sufficient in form; if the writ be good, it is not to any purpose to object to the form of such writ, if the form of the count be thereupon insufficient; but if the count be in substance variant, the defendant may shew it any time in arrest of judgment, because the court has no authority to proceed in a matter of substance different from the original.

These pleas to the jurisdiction, to the disability, or in abatement, were formerly often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now by Stat. 4 and 5 Ann. c. 16. "*No dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shewn to the court to induce them to believe it true.*" And it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better; that is, shew him how it might be amended, that there may not be two objections upon the same account. *Brownl. 139.*

When these pleas are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed; or he is obliged

Affidavit to be annexed to a plea in abatement.

If the plea be allowed, the cause is dismissed.

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If over-ruled on
demurrer, a
respondeas ouster
is awarded.

to sue out a new writ by leave of the court, or to amend and new frame his declaration. But when, on the other hand, they are over-ruled on demurrer, judgment is then given of *respondeas ouster*, or to *answer over* in some better manner. It is then incumbent on him to plead a plea in bar to the action, by which he admits the form of the writ and count; for he answers to the right on demand, and puts that right in issue, and thereby admits that there is a sufficient form to put the right in issue; and therefore, though a man pleads *non assumpsit modo et forma*, yet the *modo et forma* do not traverse the form of the writ or count, but the substance of the promise only; which is the true reason why you may give another promise in evidence, different in time and place from that mentioned in the declaration, though not different in substance. If the tenant or defendant plead in abatement, and the demandant or plaintiff demur to it, the judgment shall be only, that the defendant answer over, if the plea be disallowed. *Tb. D. l. 16. c. 11. f. 1. 3. T/w. 112. 1.*

When judgment
peremptory.

The defendant pleaded misnomer in his christian name in abatement; the plaintiff replied that he was known as well by the name of A as by the name of B, and issue was joined. Court held that the judgment must be peremptory, and that there is no difference, whether the issue be joined upon a fact in a plea in abatement, or in a plea in bar; for wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether this plea be true or false; but upon a demurrer to a plea in abatement, there shall be a *respondeas ouster*, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court. The same jury who try the issue, also assess the damages. *Eichborn v. Le Maitre. 2 Wils. 367. Vide 1 Sid. 252.*

The

The general issues are contrived in such words as are proper to deny the whole fact in the declaration; without offering any special matter to evade it. Thus, if a charge is of trespass, the general issue is, *not guilty*; if with a debt, that *he owes nothing*; if on a specialty, he admits the debt, unless he denies the deed, for the seal continuing, it must be dissolved *eo ligamine quo ligatur*; for there is that credit given to the solemnity of the seal, that the defendant cannot say he did not owe, when it appeared by the acknowledgment of the seal that he was indebted: on an *assumpsit*, *non assumpsit*. And these pleas are called the *general issue*, because, by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue: by which is meant a fact assumed on one side, and denied on the other. There is also a plea to the action, whereby the defendant confesses or acknowledges the debt to be due; and that is, where the creditor harasses him with an action, after tender and refusal of the debt; in this case it becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding, "*that he has always been ready, and still is ready, to discharge it*:" for a tender by the debtor, and refusal by the creditor, will in all cases discharge the costs, 1 Vent. 21; but not the debt itself, the defendant being obliged to pay the sum tendered into the hands of the prothonotaries of the court, which if the plaintiff accepts, he is stopped going any further in that plea, but may go for further damages upon the general issue, pleaded with the tender. *L. Raym. 774.*

General issue.

General issue
what.

Frequently the defendant confesses one part of the complaint (by *cognovit actionem* in respect thereof), and traverses or denies the rest; in order to avoid the expence of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the payment of money into court, being as much as the defendant acknowledges to be due, together with the costs incurred,

Payment of money into court.

incurred, in order to prevent the expence of any farther proceedings; and this may be done in all actions where the demand is of a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury; and if the plaintiff accepts thereof, he is to be paid his costs, if not, he proceeds at his peril; for if he does not prove more to be due than is so paid into court, he will be nonsuited, and pay the defendant costs; but he is intitled to the money so paid in at all events, for the defendant has acknowledged it to be his due.

Set-off.

If the plaintiff owes to the defendant a sum of money, as for goods sold and delivered, or the like, he may set up that demand against the plaintiff by plea, or notice of set-off, pursuant to the *Stat. of 2 Geo. 2. c. 22. and 8 of Geo. 2. c. 24.* but if the defendant's demand should not be equal to counter-balance the plaintiff's, then before he delivers such plea or gives notice of set-off, he must pay the remaining balance into court.

Formerly general
issue was seldom
pleaded (except,
&c.)

Formerly the general issue was seldom pleaded (except when the party meant wholly to deny the charge alleged against him); but when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special plea*, which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded, may be given in evidence upon the general issue at the trial. But the science of special pleading having been perverted to the purposes of *chicane and delay*, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have always allowed special matter to be given in evidence at the trial.

Special

Special pleas in bar of the plaintiff's demand are very various, according to the circumstances of the defendant's case : as in real actions, *a general release*, or a *fine*, both of which may destroy and bar the plaintiff's title. Or in personal actions, *an accord*, *arbitration*, *conditions performed*, *non-age of the defendant*, or some other fact which precludes the plaintiff from his action. Special pleas.

A justification is likewise a special plea in bar, as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault ; in trespass, that the defendant did the thing complained of, *in right of some office which warranted him so to do* ; or in action of slander, *that the plaintiff is really as bad a man as the defendant said he was*. Justification.

Also a man may plead the statute of limitations in bar ; *or the time limited by certain acts of parliament*, beyond which no plaintiff can lay his cause of action ; the use of which was calculated to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. If therefore, in any suit, the injury or cause of action happened earlier than the period expressly limited by law, the defendant may plead *the statute of limitations in bar*. *Vide 21 Jac. I. c. 16. Title, Within what time actions are to be brought*. Statute of limitations.

An *estoppel* is likewise a special plea in bar ; which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. Estoppel.

Estoppel is formed of the French word *estouper*, *oppilare*, *obstipare*, to stop or block up ; in law, an impediment or bar of action, arising from a man's act or deed ; against which a man is forbidden by law to speak, though it be to say the truth. Definition of.

There are three kinds of estoppels :—1st, *By matter of record*. 2d, *By matter in writing*, as by deed indented, &c. 3d, *By matter in pais*, as by livery, Three kinds.

Of the Proceedings.

livery, by entry, by acceptance of rent, partition, by acceptance of an estate.

By matter of record all parties are estopped, so that a man shall not be received to take an averment contrary to the record. *Co. Lit.* 352. a.

In a deed all the parties are estopped to say any thing against it; it estops a lessee to say, that the lessor had nothing in the land, &c. and parties and privies are bound by estoppel. *Co. Lit.* 58.

If the condition of an obligation be to perform all covenants contained in such an indenture, in debt upon the obligation, the defendant cannot say that there is no such indenture, because he is estopped. *Roll. Abr.* 408. *Cro. Elix.* 767. *Sand.* 316.

How to be
pleaded,

Estoppels are to be pleaded, relying on the estoppel, without demanding judgment, *fi actio*, &c. 4 *Rep.* 53.

Qualities of a
plea.

The conditions and qualities of a plea (which, as well as estoppels, will hold equally, *mutatis mutandis*, with regard to other points of pleading) are, 1st, *That it be single, and containing only one matter*; for duplicity begets confusion. But by *Stat. 4 and 5 Ann. c. 16.* a man with leave of the court, may plead two or more distinct matters or single pleas; as in assault, *not guilty*, and *son assault demesne*. 2. *That it be direct, and not by way of argument or rehearsal.* 3. *That it have convenient certainty of time, place, and persons.* 4. *That it answer the plaintiff's allegations in every material point.* 5. *That it be so pleaded as to be capable of trial*; for without trial, the cause can receive no end. *Co. Lit.* 303. b.

The plea must
be substantially
good.

The plea ought to be according to the demand, and, as the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be substantially good; that is, the essence or gist of the plea must be such, as if found for the defendant, the court, according to the rules of law, must dismiss or give judgment for him; but if the

gift of the bar be nought, it cannot be cured even after verdict found for him; if it be bad only in form, a verdict will cure it; and if the gift be traversed, all collateral circumstances will be intended after verdict. 4 *Bac. Ab.* 86. and in general pleading, prolixity is to be avoided.

Special pleas are usually in the *affirmative*, sometimes in the *negative*; but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form;—"and this he is ready to verify." Special pleas.

It is a rule in general pleading, that no man be allowed to plead specially such a plea as amounts to the *general issue*; for pleas which amount to the general issue are only facts on which the issue may be turned in evidence, and therefore are not issues of fact to be referred to the court, but matters of evidence to be determined by a jury, and consequently not good pleas: because they draw to the examination of the court what is proper to be determined by a jury: and such pleas are good causes of special demurrer, since 27 *Eliz. c. 5.* and before it, of a general one. 10 *Co. 95. a. Cro. Car.* 157. Rule in pleading.

If the defence consist in matter of law, the defendant must plead specially; for the matter of law must be shewn to the court, so as the judges may determine, whether the discharge will bar the plaintiff's action or not; and therefore, on not guilty in trespass, the defendant cannot shew a licence to prove there was no trespass; because, though the licence makes it no trespass, yet he shews that licence to an improper jurisdiction, *viz.* to the jury, who are not proper judges of the law. 3 *Mod.* 166. 5 *Mod.* 252. 2 *Salk.* 580. *pl. 1. Hob.* 174. So if a defendant shews a release of a debt to a jury, it is no evidence, because, though the release makes it to be no debt, he shews it to an improper jurisdiction. When to plead specially.

When the plea of the defendant is filed, if it does not amount to an issue, or total contradiction of the declaration, What to reply.

declaration, but only evades it, the plaintiff may reply to it: either traversing it; that is, totally denying it; or he may alledge new matter in contradiction to the plea.

Replication.

Replication (*replicatio*) is an exception or answer made by the plaintiff to the defendant's plea, and it is to contain certainty, not varying from the declaration, but must pursue and maintain the cause of the plaintiff's action, otherwise it will be a departure in pleading, and go to another matter. *Co.*

Departure, what.

Lit. 304. Therefore if the plaintiff in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shews new matter different from his declaration, this is a departure. *Plow.* 78. *2 Inst.* 147. But if the defendant takes issue upon it, he loses the advantage, for he ought to have demurred to it. *Ray.* 86. *1 Lill. Abr.* 144.

If the defendant plead one thing in bar, and the plaintiff replies to it, the defendant in his rejoinder quits that, and shews another matter contrary to, or not pursuing his first plea; this is a departure and good cause of demurrer. *1 Salk.* 121.

Traverse.

Traverse comes from the French *traverser*, and is used in the law for the denying of some matter of fact, alledged to be done in the declaration; upon which the other side comes and affirms that it was done; and this makes a single and good issue for the cause to proceed to trial: and the formal words are, in our French, *sans ceo*; in Latin, *absque hoc*; and in English, *without that*, that such a thing was done or not. *Kitch.* 217. *West. Symb. par.* 2. Every matter of fact alledged by the plaintiff, may be traversed by the defendant, but not matter of law, or where it is part matter of law, and part matter of fact; nor may a record be traversed which is not to be tried by a jury.

Rules relating to traverses.

These rules are to be observed in traverses:
1. The traverse of a thing not immediately alledged, vitiates a good bar. 2. Nothing must be traversed but what is expressly alledged. 3. Surplusage

plurage in a plea doth not inforce a traverse. 4. It must always be made to the substantial part of the title. 5. Where an act may indifferently be intended at one day or another, there the day is not traversable. 6. In actions of trespass, generally the day is not material; though if a matter be to be done upon a particular day, there it is material and traversable. 2 *Roll. Rep.* 37. 1 *Roll. Rep.* 235. *Yelv.* 122. 2 *Lill. Ab.* 313. If the parties have agreed on the day for a thing to be done, the traverse of the day is material; but where they are not agreed on the day, it is otherwise; and though it is proved to be done on another day, it is sufficient. *Palm.* 280.

Where the matter alledged by the defendant in his plea, is contrary to the matter set forth in his declaration, there must be a traverse or denial of such matter set forth in the declaration; so if the replication contradicts the matter alledged in the plea. *Lutw.* 381. *Cro. Eliz.* 30.

When traverse
is necessary.

There cannot be a traverse upon a traverse, because that in all pleadings, whereupon a traverse is properly taken, the issue is closed; and therefore a traverse cannot be taken on a traverse, for a traverse must be of a material point; if to the declaration, it destroys the plaintiff's action; if to the bar, it destroys what is said in avoidance of the action; and if to the replication, what was said in avoidance to the bar, *et sic de cæteris*, and consequently a subsequent traverse will be insignificant; because when a material traverse is taken, the rest stands confessed. *Co. Litt.* 282. *Hob.* 104. *Sand.* 20. 22. *Vaugh.* 62. *Cro. Car.* 105. *Salk.* 91.

There cannot be
a traverse upon
a traverse.

That the traverse must be taken to some material point alledged by the adverse party, which if found for him who takes it, absolutely destroys the adverse party's right, by shewing, that he hath none, *in manner and form as he hath alledged*; and being to the principal point alledged, puts an end to the matter. 2 *Saund.* 5. 28. 6 *Co.* 24. a. *Carter* 217. *Lane* 18.

It must be taken
to some material
point alledged.

Replication may
confess and avoid
the plea, and tra-
verse or deny the
fact.

The replication may confess and avoid the plea by some new matter of distinction, consistent with the plaintiff's former declaration, as in an action for trespassing on land, whereof the plaintiff is seized; if the defendant shews a title to the land by descent, and that therefore he had a right to enter and give colour to the plaintiff, the plaintiff may either traverse or totally deny the fact of the descent; or he may confess or avoid it, by replying, "*That true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life.*"

Colour in plead-
ing.

Colour (*color*) signifies a probable plea, but what is in fact false; and hath this end, to draw the trial of the cause from the jury to the judges: and therefore colour ought to be matter in law, or doubtful to the jury.

How replication
concludes when
defendant re-
joins on new
matter.

The replication, where new matter is offered, concludes with *hoc paratus est verificare*, so as to give the defendant an opportunity to rejoin; but if the plaintiff takes issue on the defendant's plea, and it be a matter to be tried by a jury, then it concludes to the country.

Rejoinder.

But if there is new matter in the replication, the defendant may rejoin, or put in his answer, called a rejoinder (*rejunctio*), which is to be a sufficient answer to the replication, and follow and enforce the matter of the bar pleaded: and if the defendant depart therefrom, the rejoinder is not good. 2 Lill. Abr. 433.

Departure in
pleading.

Departure in pleading is when the second plea contains matter not pursuant to the former, and which does not fortify the same; and when the rejoinder contains new matter subsequent to the matter, or not fortifying the same, this is regularly a departure. Co. Litt. 304. But where a man pleads any thing which he could not have shewed at first, it shall never be reckoned a departure; so where he fortifies it in the same manner that he pleaded it; but if he fortifies in another manner, as by special custom,

custom, it will be a departure. *Yelv.* 14. *Dyer* 253. *Stile* 260. *Jon.* 262. *Leon.* 156. *Cro. Car.* 257.

The plaintiff may answer this by way of surrejoinder (*quadruplicatio*), upon which the defendant may rebutt; and the plaintiff may answer him by a surrebutter. Surrejoinder, &c.

It is very seldom the pleadings run to such a length, unless in actions of trespass; there the plaintiff, after he has alledged in the declaration a general wrong, may, in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a new or *novel assignment*. As if the plaintiff in trespass declares on a breach of his close in D; and the defendant pleads that the place where the injury is said to have happened, is a certain place of pasture in D, which descended to him from B his father, and so is his own freehold; the plaintiff may reply and assign another close in D, specifying the abuttals and boundaries, as the real place of the injury; which in fact amounts to a new declaration, to which the defendant may justify, by alledging new matter; and frequently such justifications lead the parties into those great length of pleading before they join issue. Pleadings seldom run to such length, unless, &c.

A rebutter sometimes is to be met with in replevin; but mostly before the parties come to a rebutter, there is a demurrer, which brings the matter of law to an issue. Novel assignment.

It hath been previously observed, that duplicity of pleading must be avoided. Every plea must be simple, intire, connected, and confined to a single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute; for this would often embarrass the jury, and sometimes the court itself, and at all events Duplicity to be avoided.

Protestation.

The use of making protestation in pleading.

When necessary to be made.

When it shall be said the parties are at issue, and how to conclude.

events would greatly enhance the expence of the parties; yet it is frequently expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by protestation, whereby the party interposes an oblique allegation or denial of some fact, *protesting* that such matter does or does not exist; and at the same time avoiding a direct affirmation or denial, *Co. Litt. 124. b.* and it must come after *præcludi non*, and not before in law. The use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which, yet if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, if a defendant, by way of inducement to the point of his defence, alledges (among other matters) a particular mode of seisin or tenure, which the plaintiff is unwilling to admit, and yet desires to take issue upon the principal point of the defence; he must deny the seisin or tenure by way of protestation, and then traverse the defensive matter. So if an award be set forth by the plaintiff, and he can assign a breach in one part of it, *viz.* the nonpayment of a sum of money, and yet is afraid to admit the performance of the rest of the award, to aver in general a non-performance of any part of it, lest something should appear to have been performed; he may, to save himself any advantage he might hereafter make of the general nonperformance, by alledging that by protestation; and plead only the nonpayment of the money. *Co. Litt. 126. Reg. Plac. 70. 18. Vin. Ab. Title Protestation.*

In any stage of the pleadings, when either side advances or affirms any new matter, he usually (as has been said) avers it to be true; on the other hand, when either side traverses or denies the facts pleaded, he usually tenders an issue; the language of which is different according to the party by whom

whom the issue is tendered: for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "*and of this he puts himself upon the country,*" thereby submitting himself to the judgment of his peers: but if the traverse lies upon the plaintiff, he tenders the issue, or prays the judgment of his peers against the defendant thus, "*and this he prays may be inquired of the country.*"

But if either side (as for instance) the defendant pleads a special negative plea, not traversing or denying any thing that was before alledged, but disclosing some new negative matter; as where the suit is on a bond, conditioned to perform an award, and the defendant pleads negatively, that no award was made, he tenders no issue upon his plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For when, in the course of pleading, they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; and all their debates being at last contracted into a single point, must now be determined either in favor of the plaintiff or defendant.

Issue (*exitus*, from the French *issuer*, i. e. *emanare*) generally signifies the point of matter issuing out of the allegations and pleas of the plaintiff and defendant, consisting regularly upon an *affirmative* and *negative* to be tried by twelve men. 1 *Inst.* 126. 11 *Rep.* 10. Issue in fact,

There is likewise an issue upon the matter of In law. law, that is, where there is a demurrer to the declaration, plea, replication, &c. and a joinder thereto, which is to be determined by the judges. 1 *Inst.* 71, 72.

Demurrer, cometh of the Latin word *demorari*, Demurrer, to abide; therefore he who demurs in law is said to

to abide upon the point in question, for it confesses the facts to be true, as stated by the opposite party; as if the matter of the plaintiff's complaint be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right; here the plaintiff may demur in law to the plea; and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

General demur-
rer or special.

Demurrers are *general* or *special*; *general*, where no particular cause is alledged; *special*, where the particular objection is pointed out, and insisted upon as the cause of demurrer; and that as a general demurrer confesseth all such matters of fact as are sufficiently pleaded, so he that demurs specially, can take no advantage of any other matter of form than what is expressed therein; but he may of any other matter of substance. *Co. Litt. 72. a* 10 *Co. 88*. Matters of substance, that is, the omission of such material things as are necessary to shew a right in the plaintiff, or material for the defendant in his plea, may be taken advantage of on a general demurrer; but matter of *form* merely, must be *specially alledged*, and assigned as causes of demurrer. *Stat. 27 Eliz. c. 5. Sect. 1. 10 Co. 88. Doct. plac. 118. 2 Ld. Ray. 798. 2 Salk. 678. pl. 5. Stat. 4 & 5 Ann. c. 16.*

Form of a de-
murrer.

The form of such demurrer is, "by averring the
" declaration or plea, replication or rejoinder, to be
" insufficient in law to maintain the action or defence;
" and therefore praying judgment for want of suffi-
" cient matter alledged." And upon either a *general* or *special* demurrer, the opposite party, "av-
" ers it to be sufficient," which is called a *joinder* in
demurrer, and then the parties are at *issue*, in point
of law. *Co. Lit. 72. a.*

It

It may not be improper to observe, that during the whole of these proceedings, viz. from the delivery of the declaration, it is necessary that both the parties be kept or continued in court from day to day, until the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person, or by their attorneys, or upon default of one of them, after appearance, and a time prefixed for their appearance in court again: therefore, in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the time allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be nonsuit, or not to follow and pursue his complaint, and shall lose the benefit of his writ; or if it be on the side of the defendant, judgment must be against him, for such his default. And as well before issue or demurrer joined, as after, a day is continually given and entered upon the record, for the parties to appear from time to time, as the exigence of the case may require. The giving of this day is called the *continuance*, because thereby the proceedings are continued, without interruption, from one adjournment to another. If these continuances are omitted the cause is thereby discontinued, and the defendant is discharged *sine die*, without day, for this term: for by his appearance in court he has obeyed the command of the king's writ, and unless he be adjourned over to a day certain, he is no longer bound to attend that summons; but he must be warned afresh, and the whole must begin *de novo*.

Continuances
when necessary.

It has been already said, that demurrers are to be determined by the judges of the court upon solemn argument by counsel on both sides; and to that end a demurrer book is made up by the attorney, who is to support the demurrer, containing all the proceedings at length, which are afterwards entered on record, and delivered to the secondary in court; a brief is then given to a serjeant

Demurrers, how
they are brought
on to be argued,

Consilium.

jeant to move for a *consilium* (*dies consilii*) a day to hear the counsel on both sides, which is granted by the court on the reading of the record; the rule is then drawn up for that purpose, and the cause entered, copies of the demurrer book are then made and delivered to each judge to peruse, *two days* before the day appointed for the argument. *R. E. 27 Car. 2. R. M. 6 Geo. 2.* On the day appointed, the serjeants on each side argue the demurrer, which is then determined by the court, and judgment is thereupon accordingly given. If the action be in debt, and judgment is given for the plaintiff, the judgment is final; but if in case, a writ of inquiry of damages must be awarded, before the plaintiff can have final judgment. If judgment be for the defendant, the judgment is, that the plaintiff "*nihil capiat per breve*," take nothing by his writ, and that the defendant, "*eat sine die*," go without day. *Wood's Inst. 603.* Thus is an issue in law or demurrer disposed of.

Now two days.**In debt, judgment final.****In case interlocutory.****Issue of fact to be tried.**

An issue of fact is, where the fact only, and not the law, is disputed: and when he that denies or traverses the fact pleaded by his antagonist has tendered the issue thus, "*and this he prays may be inquired of by the country*," or, "*and of this he puts himself on the country*," it may immediately be subjoined by the other party; "*and the said A. B. doth the like*;" which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause on the truth of the fact in question to the determination of a jury.

Plea of puis darrein continuance.

It may sometimes happen, that after the defendant has pleaded, nay even after issue or demurrer joined, there may have arisen some new matter, which is proper for the defendant to plead; as, that the plaintiff, being a *feme sole*, is since married, or that she has given the defendant a release, and the like; here, if the defendant takes advantage of this new matter as early as he possibly can, *viz.* at the day given for his next appearance, he is permitted to plead it, and is called a plea *puis darrein continuance*,
or

or since the last adjournment: for it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former: it is dangerous to rely on such a plea, without a due consideration: for it confesses the matter which was before in dispute between the parties, *Cro. Eliz.* 49.; and it is not allowed to be put in, *if any continuance has intervened between the arising of this fresh matter, and the pleading of it*: for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea: also, it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela*, which is in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. This writ is now almost rendered useless, since the courts have shewn so much indulgence in granting a summary relief upon motion. *Ld. Raym.* 439. Issue was joined and *ven. fac.* awarded *quinden Hilarii*, which was the 27th of January; after the last continuance the defendant on the 30th of January pleaded generally, that *puis darrein continuance*, viz. on such a day he became a bankrupt, and that the cause of action did accrue before such time, as he became a bankrupt, and *hoc paratus est verificare*, &c. and verified this plea by an affidavit. Motion to set it aside as a frivolous and dilatory plea; and alledged that it was in the discretion of the court whether they would receive the plea or not; that the plea is bad, because not alledged that defendant in all things conformed, and obtained his certificate, and that it was not *pleaded in due time*: to which it was answered, the plea was as the statute directs, and was in due time, for the fact happened since issue joined, and the last continuance (which is the return of the venire) was upon the 27th of January; and this plea was put in upon the 30th of January, which is *quarto die post* of that return. The court were clearly of opinion they had it not in their power

Plea puis darrein continuance cannot be rejected by the court if it be verified by affidavit.

This plea may be received at the assizes. *Yelw.* 180. a *Roll.* 630.

Lord Camden.

power to reject the plea, and the Chief Justice said, that such discretion was contrary to the genius of the common law of England, and would be more fit for an eastern monarchy, than for this land of liberty; *nulli negabimus, &c. iusticiam*; and there is no difference between a plea *puis darrein continuance* and any other defence but this, That the fact which first warrants this plea first existed or happened since the last, and before the next continuance, it is a defence which the party could not possibly make when he first pleaded, and which he is bound to make after the last continuance, and before the next. It must be verified by affidavit. Plea received. *Paris v. Salkeld, 2 Wils. 137.*

Venire.

When the parties are at issue, as before mentioned, the court awards a writ of *venire facias* upon the roll, commanding the sheriff "*that he cause to come before the king's justices at Westminster (on such a day) twelve free and lawful men of the body of the county, by whom the truth of the matter may be better known, and who are neither of kin to the plaintiff or defendant, to recognize the truth of the issue between the parties.*" The jury is not summoned upon this writ, and therefore not appearing at the day, must unavoidably make default, and a compulsive process is now awarded on the roll against the jurors, called a *habeas corpora juratorum*, commanding the sheriff "*to have the bodies of the jurors, that they appear at Westminster, upon (the next return day after the trial) nisi prius, unless before that day the chief justice shall come into London or Westminster;*" (if the venue is there laid;) but if the venue be laid in the country, as Oxford, &c. then, "*unless before that time, viz. on Wednesday the day of July, the justices of our lord the king, appointed to take the assizes in and for the said county, shall first come at Oxford, &c.*" (the place where the assizes are usually holden.)

Habeas corpora juratorum.

When made returnable.

These writs of *venire*, and *habeas corpora juratorum*, are usually sued out together; and if the cause is to be tried in London or Middlesex, the *venire* is made

made returnable the *first return of that term wherein the issue is joined*, and the *habeas corpora* the *next return day after the day of trial*; as, for instance, if the cause is to be tried the *last sitting within the term*, then if a *general return* happens *after that day*, that is the *proper return day for the return*: if after term, the *first general return day of the next term*: if it is a country cause, the *venire* is made returnable on the *last general return of the same term wherein the issue is joined*, viz. Hilary or Trinity terms; which from the making up the issue therein, are usually called *issuable terms*, and the *habeas corpora* on the *first general return of Easter*; they are taken to the sheriff of the county where the venue is laid, who returns the names of the jurors in a panel annexed to the writ (*viz.*) a little pane, or oblong piece of parchment.

If the sheriff be not an indifferent person, as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury; but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff, to execute process, when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn; and these two, who are called *elisors*, or *electors*, shall indifferently name the jury, and their return is final. *Fortescue de laud. c. 25.* The clause of *nisi prius* was inserted by *Stat. W. 2. 13 Ed. 1. c. 30.* Then the pleadings on both sides are fairly entered on a piece of parchment stamped, which is called a *record of nisi prius*, and having passed the proper offices, is delivered to the judge's marshal, with the *habeas corpora juratorum*, and sheriff's return annexed, who enters the cause for trial: on the day appointed the parties attend, and the cause is called on in its due course: the record, or a short account of it, is then handed to the judge, to peruse and observe the pleadings, and see what issues

If the sheriff be a party, *venire* to go to the coroners.

Record.

issues the parties are to maintain and prove, while the jury is called and sworn: the case is then opened, first on the part of the plaintiff, and afterwards for the defendant, by their counsel; and when the evidence is gone through on both sides, the judge, in presence of the parties, the counsel, and all others, sums up the whole to the jurors, with such remarks as he thinks necessary for their direction, and giving them his opinion of law arising upon that evidence; upon which the jury are to consider and return their verdict at the bar, which, when done, is recorded in court by the clerk of the *nisi prius*, and then they are discharged.

Verdict.

Bill of exceptions.

If the judge in his directions or decisions mistakes the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*; and this he is obliged to seal by *Stat. W. 2. 13 Ed. 1. c. 31.*; or if he refuses so to do, the party may have a compulsory writ against him, *2 Inst. 487*, commanding him to seal it, if the fact alledged be truly stated. This bill of exceptions is in nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court upon a writ of error, after judgment given in the court below.

The writ of error is directed to the judge who puts his seal to the bill of exceptions, commanding him personally to appear in the superior court, to confess or deny the seal put thereto according to the statute. *Vide 3 Burr. 1693.*

When the bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment in the point on which the bill of exceptions was allowed; for his proper redress is by writ of error. *1 Vent. 366. 2 Lev. 237.*

Demurrer to evidence.

Demurrer to evidence, is when a record or other matter is produced in evidence; concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may

may demur to the whole evidence; which admits *the truth of every fact* that has been alledged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue, 5 Rep. 104, which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. Dougl. 131.

The demurrer admits the truth of all facts, which, upon the evidence stated, might be found by the jury in favour of the party offering the evidence. *Per Buller J.* 1 Dougl. 133.

If the issue be found either for the plaintiff or defendant, or specially, or if the plaintiff makes default, or is nonsuit, it is entered on the record, and is called a *poslea*, which being entered, judgment may be signed thereon, unless ordered by the court to the contrary, for the verdict may be suspended for certain causes by a motion for a new trial, or arrested. 6 Mod. 22. Salk. 649. Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attainted, will find a special verdict; which is grounded on the Stat. Westm. 2. 13 Ed. 1. c. 30. sect. 2.; and herein is stated the naked facts as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, "that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant." Jury may find special verdict. This is entered at length on the record, and afterwards argued and determined in court.

Another method of finding a species of special verdict is, when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge, on a *special case* stated by the counsel on both sides with regard to a matter of law; which hath this advantage over a special verdict, that it is attended with a much less expence, and obtains a much speedier decision, the *poslea* being stayed in the hands of the officer of *nisi prius*, till

Or generally, subject to the opinion of the court.

F

till the question is determined; and the verdict is then entered for the plaintiff or defendant, as the case may happen. But as nothing appears upon record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law, which makes it a thing to be wished, that either a method could be devised of either lessening the expence of special verdicts, or else of entering the case at length upon the *posse*. But in both these cases the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law, and without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant. *Co. Litt.* 386.

Judgment may
be stayed for
causes,

But to return to the verdict of the jury, where it is generally found either for the plaintiff or defendant. In this case it has been already observed, that the judgment may be stayed for certain causes, or finally arrested; for it cannot be entered until the next term after trial had, unless the cause be tried *within the term*; so that if any defect of justice happened at the trial, by *surprize, inadvertency, or misconduct*, the party may have relief in the court by obtaining a *new trial*; or if, notwithstanding the fact be regularly decided, it appears that the complaint was either *not actionable* in itself, or *not made with sufficient precision and accuracy*, the party may supersede it, by *arresting* or *staying* the judgment.

Repleader.

If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, on an action on the case in assumpsit against an executor, he pleads that he himself (instead of the testator) made no such promise; or if in an action on debt on bond conditioned to pay money on or before a certain day, the defendant pleads payment on the

the day, *Str.* 994. (which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid *before*;) in these cases the court will after verdict award a *repleader*, *quod partes replacent*; unless it appears from the whole record that nothing materially can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless. *1 Burr.* 301. And whenever a repleader is granted, the pleadings must begin *de novo* at the stage of them, whether it be the *plea*, *replication*, *rejoinder*, &c. wherein there appears to have been the first defect or deviation from the regular course. *Salk.* 579. *Ray.* 458.

There can be no costs to either party on a repleader, because it is a judgment of the court upon the pleading, and therefore differs from an amendment. *2 Vent.* 196. *2 Salk.* 479. *6 Mod.* 2. No costs.

No repleader can be awarded after a default. *2 Salk.* 578. No repleader after a discontinuance. *Comb.* 323.

Where it appears clearly that the defendant can have no title or defence, whatever shape or form the pleadings may be put into, there judgment shall be given against him, without awarding a repleader. *1 Burr.* 299.

After demurrer, a repleader is not to be admitted, because by the demurrer the parties have put themselves upon the judgment of the court. *5 Co.* 52. After demurrer
no repleader.

Nor before the trial, because the fault of the issue may be helped by the trial by the statute of jeofails. *1 Salk.* 579. Nor before trial.

Causes of suspending the judgment by granting a new trial, are wholly extrinsic, arising from matter foreign to, or *dehors the record*. Of this sort are want of notice of trial, or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury amongst themselves: also, if it appears by the judges report, certified to the court, that the jury have brought in a verdict without, or contrary to evidence, so that he is reasonably New trial.

ably dissatisfied therewith, *Bull. nisi prius*, 303-4.; or if they have given *exorbitant damages*, *Comb.* 357.; or if the *judge* himself has *misdirected the jury*, so that they found an *unjustifiable verdict*; for these and other reasons of the like kind, the court will award a second trial. But if two juries agree in the same, or a similar verdict, a third is seldom awarded, 6 *Mod.* 22.; for the law will not readily suppose, that the verdict of any one subsequent jury, can countervail the oaths of the two preceding ones.

New trial of a date very ancient.

This mode of granting a new trial, particularly where it could be shewn that the jury had grossly misbehaved themselves, is of a date extremely ancient; and there are instances in the year books of the reigns of *Ed. 3. H. 4. & 7.* of judgments being stayed, (even after a trial at bar,) and new *venires* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a jurymen before he was sworn. *Brook. Ab. tit. Verd.* 17, 18. 75. And upon these *Glynn Ch. Jus.* in 1655. grounded the first precedent that is reported for granting a new trial on account of excessive damages given by the jury; apprehending with reason, that *notorious partiality* in the jurors was a principal species of misbehaviour. *Stile*, 466. A few years before, a practice took rise in this court of granting new trials upon the mere certificate of the judge (unless certified by any report of the evidence) that the verdict had passed against his opinion; and at that time was clearly held for law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *posse*, and not merely surmised to the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. *Cro. Eliz.* 616. *Palm.* 325. 1 *Brownl.* 227. But very early in the reign of *Charles the Second*, new trials were granted upon affidavits, 1 *Sid.* 235. 2 *Lev.* 140. and the former strictness of the courts of law, in respect

respect of new trials, having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them, the maxim at present adopted being this, "*that in all cases of moment, where justice is not done upon one trial, the injured party is entitled to another.*" 1 Bur. 395.

The ground for a new trial (if the matter be such as did not, or could not appear to the judge who presided at *nisi prius*) is disclosed to the court by affidavit: if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large, why a new examination ought or ought not to be allowed: the true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

The ground for the motion is by affidavit.

A motion for a new trial cannot be made *after the appearance day of the return of the habeas corpus juratorum*, unless the foundation of the motion be a fact not disclosed to the party till after that time. Barnes, 443. *Willis v. Bennett.*

Cannot be made after the appearance day of return of *habeas corpus jurat.*

Arrest of judgment arises from extrinsic causes, appearing upon the face of the record; as, if the case laid in the declaration is not sufficient, in point of law, to found an action upon, or where the verdict materially differs from the pleadings and issue thereon; and the rule with regard to arrests of judgment upon matter of law is, "*that whatever is alledged in arrest of judgment, must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea*"; as if, on an action of slander, in calling the plaintiff a *Jew*, the defendant denies the words, and the issue is joined thereon. Now, if a verdict be found for the plaintiff, that the words were actually spoken whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a *Jew* is not

Arrest of judgment.

Of the Proceedings.

actionable; and if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. Exceptions that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer; or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict, and not suffered, in the last stage of a cause, to unravel the whole proceedings.

Trial by record.

Trial by record, is only used in one particular instance; and that is, where a matter of record is pleaded in any action, as a *fine*, a *judgment*, or the like; and the opposite party pleads, "*nul tiel record*;" that there is no such record existing: upon this, issue is tendered and joined; and hereupon the party pleading the record, has a day given him to produce it, on which day proclamation is made in court for him to "*bring forth the record by him in pleading alledged, or else he shall be condemned*;" and on his failure the plaintiff shall have judgment to recover. The trial of this issue is merely by the record; for, as Sir Edward Coke observes, a record or inrollment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded, that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself. 1 *Inst.* 117. 260. Thus titles of nobility, as whether *earl* or no *earl*, *baron* or no *baron*, shall be tried by the king's writ or patent only, which is matter of record. 6 *Rep.* 53.

Judgments,
what.

If judgment is not arrested or suspended by a new trial, it is then to be entered on the roll or record of the court; and judgments are the sentences of the law, pronounced by the court upon the matter contained in the record, and are of four sorts: *first*, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer: *secondly*, where the law is admitted by the parties, and the facts disputed,

disputed, as in the case of judgment on a *verdict*: *thirdly*, where both the fact, and the law arising thereon, are admitted by the defendant, which is the case of judgment by *confession* or *default*: or, *lastly*, where the plaintiff is convicted that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *nonsuit* or *retraxit*.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law; it is the conclusion that naturally and regularly follows from the premises of law and fact, which stands thus: against him who hath rode over my corn, I may recover damages by law; but *A.* hath rode over my corn, therefore I shall recover damages against *A.* If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue in fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but "*it is considered,*" *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like: which implies that the judgment is none of their own; but the act of the law pronounced and declared by the court after due deliberation and inquiry.

Judgment is the sentence of the law, though pronounced by judges.

All these species of judgments are either *interlocutory* or *final*. Interlocutory judgments are such

There are two sorts of judgments.

Of the Proceedings.

as are given in the middle of a cause, upon some plea, proceedings, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff, upon pleas in abatement of the suit or action; in which it is considered by the court, that the defendant do answer over, *respondeat ouster*; that is, put in a more substantial plea. 2 Saund. 30. It is easy to observe, that the judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had, when the defendant hath put in a better answer.

The most usual
interlocutory
judgment.

But interlocutory judgments most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers; for when judgment is given for the defendant, it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession, or *cognovit actionem*, when he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete; and therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some nominee of the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*), in an action of debt to be brought by the creditor against the debtor for the specific sum due;

due: which judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other judgments) be regularly docketed, that is, abstracted and entered in a book, according to the directions of the statute of 4 and 5 W. & M. c. 20. But where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is, "*that the plaintiff ought to recover his damages (indefinitely), but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men, he inquire into the said damages, and return such inquisition into court.*" This process is called a writ of inquiry; in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff hath nearly sustained; and when their verdict is given, which must assess some damages, the sheriff returns the inquisition, which is entered upon the roll in the manner of a *postea*; "*and thereupon it is considered, that the plaintiff recover the exact sum of the damages so assessed.*"

In actions on bills of exchange and promissory notes, the writ of inquiry may now be dispensed with, by the plaintiff's moving (after interlocutory judgment) the court for a rule to shew cause why it should not be referred to the prothonotary to ascertain the damages, and calculate interest on the bill or note, and that plaintiff may be at liberty to sign final judgment thereon. *Rashleigh v. Salmon*, 1 H. Black. Rep. 252. *Andrews v. Blake*, 529. *ibid.* In like manner, when a demurrer is determined for the plaintiff, upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry. In this case the like motion may be now made in an action on a note or bill of exchange.

ACTIONS on bills and notes, the inquiry may now be dispensed with.

This

An inquest of office.

This is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages. *Wilmot C. J. 3 Will. 62.*

Final judgments, the definition of.

Final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if the judgment be for the plaintiff, "*it is also considered that the defendant be either amerced, for his wilful delay of justice, in not immediately obeying the king's writ, by rendering the plaintiff his due,*" 5 Rep. 49. "*or be taken up, to pay a fine to the king, in case of any forcible injury.*" Though now, by Stat. 5 and 6 W. & M. c. 12. "*no writ of capias shall issue for this fine, but the plaintiff shall pay 6s. 8d. and be allowed it against the defendant among his other costs.*" And therefore in judgments in this court, they enter that the fine is remitted, and in the king's bench they take no notice of any fine, or *capias* at all, *Salk. 54. Carth. 390.*; but if judgment be for the defendant, "*then it is considered, that the plaintiff, and his pledges of prosecuting, be (nominally) amerced for his false suit; and that the defendant may go without a day, eat fine die; that is, without any farther continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied, and his innocence publicly cleared.*"

Execution follows the judgment.

After judgment is entered, execution will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of the proceedings; and then he has his remedy to reverse them by several writs in the nature of appeals, *viz. audita quærela*, or writ of error; that of attain, being (since the practice of granting new trials) suspended, and there has not been an instance of one in our books for many years. *Vide Cro. Eliz. 309. Cro. Jac. 90.*

Audita quærela almost out of practice.

An *audita quærela* is where the defendant, against whom judgment is recovered, and who is therefore

in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment; as if the plaintiff hath given him a general release; or, if the defendant hath paid the debt to the plaintiff, without entering satisfaction on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant hath been heard, *audita querela defendantis*, and then setting out the matter of complaint; it at length enjoins the court to call the parties before them, and having heard their allegations and proofs, to cause justice to be done between them. It also lies for bail, when judgment is obtained against them by *scire facias*, to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by *audita querela*, which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party has a good defence, but by the ordinary forms of law had no opportunity to make it. 1 *Roll. Abridg.* 308. *Finch.* 188. *F. N. B.* 102. But the indulgence now shewn by the courts, in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice. *L. Raym.* 439.

But if the judgment cannot be arrested, or the party obtain a new trial, execution will follow; unless the party condemned thinks himself unjustly aggrieved by any of the proceedings; and then he has his remedy to reverse the same, by bringing a writ of error: but he that brings it must find substantial

If judgment not arrested, or no new trial, execution follows.

stantial bail to prosecute the same in many cases, and must bring it in time so as to prevent the plaintiff's proceeding, which must be when he is entitled to sign his judgment. *Stat. 3 Jac. 1. c. 8. 13 Car. 2. c. 2. 16 and 17 Car. 2. c. 8.*

Execution is adapted to the action.

The execution of the judgment is adapted according to the nature of the action; therefore if plaintiff recover in a real or mixed action, wherein the seisin of the land is awarded to him, the writ is an *habere facias seisinam*, or an *habere facias possessionem*. *Finch, 470. Co. Lit. 34.*

Execution in different actions.

Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts, against the body of the defendant, called a *capias ad satisfaciendum*; or against his goods and chattels, called a *fiery facias*; or against his goods and profits of his lands, called a *levari facias*; or against the goods and the possession of his lands, called an *elegit*; or against all three, his body, lands, and goods, called an *extent*, or *extendi facias*; but only one of these writs can be issued at one and the same time. *2 Inst. 143. Co. Lit. 290. L. Raym. 346.*

Satisfaction when to be entered.

When the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by compulsory process, or otherwise, *satisfaction* ought to be entered on the record, that the defendant may not be liable hereafter to be harassed a second time on the same account. *2 Lill. Abr. 495.* This is seldom done unless the defendant has real estates; in that case a warrant of attorney is executed by the plaintiff, empowering certain attorneys therein-named to enter satisfaction on the roll. *Vide title Satisfaction.*

Of the Judges and Officers of the Court.

IT is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party; but at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of the several courts, which are the grand depository of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot alter but by act of parliament. *2 Haw. Pl. of the Cr. 2.*

The king formerly heard causes, but delegated the power to the judges for many ages back.

In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated, indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative, and also from the executive power: were it joined with the legislative, the life, liberty, and property of the subject, would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative: for which reason, by the statute of 16 *Car. I. c. 10.* which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council, who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which

which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than limiting the provinces of a judge and a minister of state.

His majesty is present in his courts.

His majesty, in the eye of the law, is always present in all his courts; though he cannot personally distribute justice. His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. *Fortesc. c. 8. 2 Inst. 186. ibid. 549.*

Judge to determine the law, the jury the fact.

It is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and the jury are kept distinct; that the judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England. Per Hardwicke C. J. Rep. temp. H. 28.

The judges are four in number.

The judges consist of the Lord Chief Justice, and three other justices, who sit every day (except Sundays, the Purification, Ascension, and Midsummer-day) in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed, and compounded of both; and by *Stat. 20 Ed. 3. c. 1.* they are to take no fee but of the king. Their commissions, in early periods, were *durante bene placito*, afterwards *quamdiu bene se gesserint*, 13 W. 3. c. 2. with a power to remove them on the address of both houses of parliament; but now they are to continue in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secure to them during the continuance of their commissions. 1 Geo. 3. c. 23. This act was made at the earnest recommendation of the king himself from the throne, declaring, "that he looked upon the independence and uprightness of the judges, as essential to the impartial admini-

Their commissions.

"stration of justice, as one of the best securities of the
"rights and liberties of his subjects, and as most con-
"ducive to the honor of the crown." Com. Journ.
3 Mar. 1761.

The present judges are,

Sir James Eyre, Knight, Chief Justice, £ 3500 per
ann. late Chief Baron of the Exchequer.

Sir Henry Gould, Knight, }
John Heath, Esq; } £ 2400 each.
Sir John Wilson, Knight, }

Salaries ascertained by Stat. 12 & 13 W. 3. c. 2:
Stat. 13.

Augmented by Stat. 32 Geo. 2. c. 35. s. 18.

Made payable by Stat. 1 Geo. 3. c. 23.

Augmented by Stat. 19 Geo. 3. c. 65.

A judge at his creation takes an oath, "That he Oath.
"will serve the king, and indifferently administer
"justice to all men, without respect of persons, take
"no bribe, give no counsel where he is party, nor
"deny right to any, though the king by his letters, or by
"express words, command the contrary," &c. and he
is answerable in body, land, and goods. 18 Ed. 3.
c. 1.

If an action be brought against a judge of record
for an act done in his official capacity, he may plead
that he did it as judge of record, and that will be
a sufficient justification; and so may a judge of a
court in a foreign country under the dominion of
the crown. *Mostyn v. Fabricas*, Cowp. Rep. 172.

Officers of the Court.

Custos brevium.

THE *custos brevium* is the first or principal officer of this court, and holds his place by the king's letters patent; the present patentees are, *John Browning*, Sir *Robert Eden*, Baronet, *Frederick Young*, and *Edward Gore*, Esquires, who execute the said office by *Thomas Francis Martin*, Esquire, their deputy. Office, No. 3, *Brick Court*, Temple.

Prothonotaries.

There are three *prothonotaries* of this court, who hold their offices for life, and are admitted by the chief justice of the court for the time being. But the second prothonotary is admitted on the nomination of the *custos brevium*, who, in right of his office, has that appointment.

The present *prothonotaries* are, *William Mainwaring*, *Henry Earle*, *Anthony Dickins*, Esquires. Their office, No. 2, in *Tanfield Court*, Inner Temple.

Attendance.

In term time, they are to attend the sitting of the court at *Westminster*, for the dispatch of such matters as arise from causes entered in the office, and to inform the court of the state of such causes, and certify to them in matters of practice when required. One prothonotary attends every day in term (except the first and last days) at their office, in the forenoon from eleven to one, and all attend in the afternoon from six to eight.

Secondaries.

There are three *secondaries* in this court; one belonging to each prothonotary, who has the nomination and appointment of such secondary. The present secondaries are, *Henry Fothergill*, *William Skin*, and — *Loddington*, Esquires. In term time they attend the court and judges in the treasury, to read all the records, writings, affidavits, petitions, papers, and exhibits; take minutes of all rules and orders, and draw up the same, and take recognizances in court;

Duty.

court; have the custody of the court books, in which are entered the names of all causes on demurrer, special verdicts, and other matters that are to be argued in court, and of causes that are to be tried at bar; enter all commitments of prisoners, discontinuances, and satisfactions, acknowledged upon record, and amend records by order of the court, &c.; attend trials at bar, &c.

Clerk of the judgments, Mr. Rowland Lickbarrow; he draws up all final judgments after inquiries taken, verdicts obtained, or nonsuits had at *nisi prius*, and on demurrers, and issues joined upon *mul tiel record*; draws up and enters all continuances necessary; draws up the award or writ of *elegit* and *partition*, enters the same with the return thereof upon the roll: enters all satisfactions upon judgments, when the same is done by order of a judge, and not in open court; and exemplifies any of the above mentioned judgments, if applied for within a year after signing such judgments.

Clerks of the judgments.

Clerk of the dockets and declarations, Mr. Thomas Sherwood. He enters upon remembrance all appearances to writs of attachments of privilege, writs of *scire facias*, &c. filed with the prothonotaries, prepares bail pieces or recognizances to attachments of privilege, *habeas corpus*'s, and other bailable writs issuing out of the prothonotary's office; attends the court, or a judge, when such recognizances are taken, and when such bails are justified, or additional bail is put in; and also, when the defendant surrenders himself in discharge of such bail: makes copies of all special juries, certificates of declarations not being filed against prisoners; and also certificates of writs of *recordari*, and writs of *false judgment*, not being filed according to the course and practice of the court. And, as clerk to the prothonotaries, makes out copies of all special verdicts for the judges, and attornies concerned therein, &c.

Clerk of the dockets.

Clerk of the reversals, Mr. Rowland Lickbarrow; he is jointly and verbally appointed by the three prothono-

Clerk of the reversals.

Officers of the Court.

Duty.

prothonotaries; he draws up and enters the *præcipe's* thereof on remembrances, and draws up certificates thereof to the outlawry office; draws up and engrosses the bail pieces, or recognizances, in order to such reversals, and attends therewith; and makes out the *superfedeas* when necessary.

Clerk of the treasury.

Clerk of the treasury, Mr. *Thomas Jefferies*; he is appointed, by parole, from the lord chief justice.

Clerk of the jurats.

Henry Brougham is clerk of the jurats, or one of the under clerks of the treasury, for all the counties of England; and is admitted by the lord chief justice of the court; and holds his place for life.

Treasury keeper.

Mr. *George Stubbs* is the treasury keeper, and holds his place also by parole appointment of the lord chief justice.

Filazers.

Filacer or Filazer (*filizarius*, from the Latin *filum*) is an officer of this court, so called because he files those writs whereon he makes out process.

There are thirteen filacers, among whom the several counties of England are divided, *viz.*

For the Counties of	Who executed by.	For the Counties of	Who executed by.
Bedford	} Mr. Bolton. Executed by himself, No. 4, Elm Court.	Bristol	} Mr. Clarke. Executed by himself at the King's Bench Office.
Berks		Dorset	
Bucks		Poole	
Cornwall		Somerset	
Gloucester			} Mr. Lenton. Executed by Mr. Clarke.
Hereford		Suffolk	
Oxon			} Mr. Irwin. Executed by Mr. Bolton.
Worcester		Cambridge	
London and Middlesex	} John Erskine, Esq. Executed by Mr. Bolton.	Huntingdon	
Suffex	} Mr. Thomas Holloway. Executed by Mr. Bolton.	Derby	} Mr. Skinn. Executed by Mr. Bolton.
Surry		Leicester	
Kent		Nottingham	
		Warwick	

Hant

For the Counties of	Who executed by.	For the Counties of	Who executed by.
Hants Wilts	{ Mr. Holloway. Executed by Mr. Bolton.	Cumberland Northumber- land Newcastle Westmorland Devon	{ Mr. Batten. Exe- cuted by him- self, No. 4, Hare Court.
Norfolk Norwich Stafford Northamp- ton Salop Rutland Monmouth	{ Mr. Roberts, and executed by Mr. Bolton.	Lincoln and City of Lincoln	{ Mr. Sibthorpe. Executed by Mr. Batten.
Essex Herts	{ Mr. Erskine. Executed by Mr. Bolton.	Kingston upon Hull York, and Yorkshire	{ Mr. Batten. Exe- cuted by himself.

N. B. Filacer for the counties palatine of *Chester*, *Lancaster*, and *Durham*, Mr. Roberts. Executed by Mr. Bolton.

The filacers formerly living at a great distance from the inns of court, which was thought very inconvenient for the practisers thereof, the court therefore thought proper to make the following rule in *Hilary Term 1783*: "Whereas it would be very convenient to the suitors of this court, if the several offices of the filacers were executed in one place; and the filacers having made a proposal to this court for that purpose; and that the ground chamber at No. 4, in *Hare Court*, in the *Temple*, will be a fit and convenient place for the same; It is ordered by this court, that the several offices of the filacers shall, from and after the first day of the next ensuing *Easter Term*, be executed in the above-mentioned chamber; and that if hereafter it shall be found necessary or proper to appoint another place for the execution of the said offices, instead of the above-mentioned chamber, this court, on ap-

New rule re-
specting the
filacers.

Officers of the Court.

“ plication, will take the same into considera-
“ tion.

“ *By the court.*”

What writs are
made out by the
filacers.

By rule *M. 14 Jac. 1. 1616*. All manner of *capias*, *alias* and *pluries*, and all other *incident process*, before appearance of the defendant, in all actions wherein process of outlawry doth lie (until the exigent awarded), are to be made out by the filacers of this court only: also, all *grand capes*, *pone* and *distringas*, as well *peremptory* as *infinite*, and also *incident process*, before appearance of the tenant or defendant, *writs of seisin*, and *writs* to enquire of damages issuing before appearance of the tenant or defendant (but all judgments upon writs of enquiry of damages are to be entered with the prothonotary only): also all writs of *supersedeas* upon any *capias* awarded out of their own offices, and writs of rescous upon the sheriff's return: also the entering of all comparance of writs issuing out of their own offices, the entering of rolls to compel the defendants to appear, their bails upon appearance, and marking the first *scire facias* upon the said bail: also view in dower, or any other action where it lieth, entering thereof, and writs of view thereupon; also all writs of *retorn. habend.* upon nonsuit before appearance, writs of *second deliverance* before appearance, writs of *capias in withernam*, *alias* and *pluries*; likewise before appearance, &c. *Ibid.*

Take special bail
in common
cases.

They take special bail in common cases, *R. Trin. 1 W. & M. reg. 2.*; appearances are to be entered with them, *R. E. 24 Car. 2. reg. 2.*; procure the original to be sued forth and filed on process to outlawry, *R. Trin. 1649*; take affidavits of debts, in order to hold to bail, affidavits of the service of process, file bills brought against persons intitled to privilege of parliament, and make out the subsequent process thereon before appearance.

Clerk of the
warrants.

The clerk of the warrants, inrolments, and estreats is *Keane Fitzgerald*, Esquire, who is admitted into the said office by the lord chief justice of this court;

court; his deputy *Mr. Richard Lee, No. 3, Pump Court*; he files all warrants of attorney upon judgments, issues, outlawries, writs of covenant, stamps all judgment papers, records, pluries capias, in outlawry, and writs of covenant; also files the warrants of attorney of sheriffs for the different counties in England, and attornies certificates.

The clerk of the *essoigns* is in the appointment of the lord chief justice, and has usually been granted for life. The present clerk is *N. Smith, Esq*; and is executed by *Mr. Bolton*, and *essoigns* are entered in this office in real actions only; for it is now determined that no *essoign* lies in *personal actions*: and in case the defendant doth not *essoign* by the time limited by the rules of the court in real actions, the plaintiff may enter in this office a *ne recipiatur essoign*.

Clerk of the
essoigns.

In this office all judgments in this court are docketed, pursuant to the Stat. 4 & 5 W. & M. c. 20. and rolls belonging to the several offices of the said court are marked, numbered, and delivered out to the prothonotaries; and when the proper entries are made thereon, they are returned into this office, and carried by him to the treasury at Westminster.

Judgments
docketed.

The office of clerk of the juries is in the gift and nomination of the *custos brevium* for the time being. The present clerk is *Mr. Thomas Bever*; *Mr. Jefferie* is his deputy.

Clerk of the juries.

His duty is to make out writs of *habeas corpora juratorum*, for the trial of issues in London and Middlesex, and for the assizes in the country.

The return office and office of enrolment of writs for fines and recoveries, is in the nomination of the three puisne judges by virtue of an act of parliament made in the twenty-third year of queen Elizabeth. *Mr. Henry Barnes* is clerk of the enrolments, and the office is executed by *Mr. Lickbarrow*.

Return office.

Mr. Lickbarrow returns all writs of covenant, entry, summons, and seisin, in the names of the

Return of writs
of covenant, &c.

sheriffs of the several counties and cities in *England*, and makes regular entries in books, provided at his own charge for that purpose.

Clerk of the
king's silver.

The clerk of the king's silver is *William Dawes*, Esquire, who claims it to be his duty to inspect and see that all fines passed in his office have regularly passed through the several offices, conformable to the usage of the court; to enter the whole of all fines, together with the post fine paid thereon, into books which remain in the office as records: he is also to stop all such fines, against the passing of which *caveats* are entered, and file such *caveats* with all rules of court, judges orders, and affidavits of the cognisors, being alive, where captions have been brought to this office.

Caveats for stop-
ping of fines.

All caveats, and orders for stopping any fines, shall be renewed every term, and copies thereof left with the clerk of the king's silver, for which he is to demand only his ancient fee of 3*s.* 4*d.* the term; and in default thereof all caveats that shall not be so renewed, shall lose their force and effect. *R. E.* 29 *Car.* 2.

Erazure.

Where a *razure* in the *day* or *year* shall appear in the *caption of a fine*, it shall not pass this office without an *allocatur* from a judge. *R. E.* 9 *Ann.*

Chirographer.

The office of chirographer is held by letters patent from the crown, and Sir *George Calbrook*, Bart. is the present patentee, under whom Mr. *Welch* is appointed secondary to officiate in the said office. There is a register and record keeper belonging to the said office, and the chirographer appoints certain clerks for the several counties in *England*.

Chirographer's
office.

The chirographer draws up and makes out, from all parts of the fine, the final concord, and ingrosses a record thereof: the office is kept No. 2, *Hare Court, Temple*.

Exigenter.

The office of exigenter is executed by Mr. *James Meadowcroft*, by appointment from the chief justice; he executes the office, No. 36, *Bedford*

ford Row: his duty is to make out *exigents*, *proclamations* on *pluries capias*, in order to proceed to *outlawry*: also an *allocatur exigent*.

The office of clerk of the *superfedeas* to the *exigent* is executed by Mr. *Meadowcroft*. It is his business to sign all writs of *superfedeas* to *exigents quia improvide*, &c. in the said court, to prevent a person being outlawed or waived, against whom an *exigent* has issued. Superfedeas.

The office of the clerk of the *outlawries* is incident to the office of his majesty's attorney general, and always executed by some person appointed by him for the time being: the present clerk of the attorney general has it, and his duty is to make out all writs of *capias utlagatum*, *sequestrations* of all *ecclesiastical benefices* in all *personal actions* in the said court after the return of the *exigent*. Inquisitions taken on special writs of *capias utlagatum* are transmitted into this office, and are here exemplified upon rolls signed by the clerk of the *outlawries*, and then carried into the office of the king's remembrancer of the court of *Exchequer*, and there filed on record, and the inquisitions themselves, and writs of *exigent*, are filed with the *custos brevium*. Clerk of the outlawries.

The most noble *Augustus Henry Duke of Grafton* is seised in fee tail of this office, and claimeth the receipt of the revenue arising from the sealing of writs, *exemplifications*, and other things whatsoever sealed with the seal of this court. Mr. *Samuel Rogers* is his Grace's deputy. Sealer Mr. *Joseph Neal*. Seal office.

The clerk of the errors has the allowance and receipt of all writs of error upon judgments in this court; gives certificates thereof; makes out writs of *superfedeas*; enters bail taken thereon; makes out writs of *scire facias* against the bail; gives rules for bail; rules for plaintiff in error to certify the record; makes transcripts of the records and judgments; transmits the same into the court of *King's Bench*, &c.; signs *non-proffes* for not certifying the record; allows and returns all *certioraries* directed Clerk of the errors.

Officers of the Court.

to the lord chief justice, for certifying records from this court into any other. Mr. *Stephen Hough*, at Master *Pepys's* chambers in *Symond's Inn*.

Judges clerks.

The judges clerks are verbally appointed by their respective judges, to continue during pleasure.

The clerks of the lord chief justice make out commissions for taking affidavits and special bails, and file the approbations signed by one of the puisne judges, in order for such commissions, and enters the names of the commissioners so appointed, in a book kept for that purpose. Mr. *Mortimer* is clerk to the chief justice. Mr. *William Watson* trainbearer.

Associate.

The office of associate at *nisi prius* for London and *Middlesex*, is in nomination of the lord chief justice, and generally granted by parole, to hold during pleasure. *Harry Edgell*, Esquire.

Marshal.

The office of marshal for London and *Middlesex*, is also in nomination of the lord chief justice, and has been, time immemorial, granted by parole appointment, to hold during his pleasure. Mr. *Edgell*.

Cryer.

Cryer at *nisi prius*, for London and *Middlesex*, is in the gift of the lord chief justice for the time being, and been usually granted by parole appointment to hold during pleasure. Mr. *T. Gordon*.

Proclamator.

John Walker Heneage, Esquire, hereditary chief proclamator to this court, granted to *John Walker*, Esquire, the office of marshal proclamator, and barrier of this court, with all fees, &c. to hold to him and his heirs for ever. There are four persons act as cryers to the court; one of which is also court-keeper, and another porter of the court; which cryer, court-keeper, and porter, are deputies to the chief proclamator. Their duty is to attend this court, and make proclamations, &c.

Court-keeper.

The court-keeper is appointed by the chief proclamator, Mr. *Hopkins*.

Porter.

The porter of the court holds his place by the appointment of the chief proclamator, Mr. *Stone*.

Warden.

The warden of the *Fleet* prison is *John Eyles*, Esquire, appointed by letters patent to hold during pleasure;

pleasure; he is to receive and have the custody of all prisoners committed by this court to the *Fleet* prison. Mr. *Nixon* is his deputy.

The present clerk of the papers and rules of the *Fleet* prison is Mr. *Nixon*, who holds his place by grant or appointment of the warden. Clerk of the papers of the Fleet.

There are two tipstiffs attendant on this court, Tipstiffs. who are admitted by deputation from the warden of the *Fleet*: they attend the judges while sitting in court, and in the afternoon at their chambers; and out of term they attend there morning and afternoon. One of them also attends the lord chief justice at the sittings of *nisi prius* for *Westminster*, *London*, and on the circuits.

Attornies of the Court.

Definition.

AN attorney, *attornatus*, or *attornatus*, in law, is an officer appointed by the court, to prosecute or defend actions brought against or prosecuted by their clients: and the word is compounded of the Latin word *ad*, to, and the French, *tourner*, to turn; "*to turn a business over to another.*" The ancient Latin name, according to *Bracton*, is *responsalis*; and they answer to the *procurator*, or proctor of the civilians and canonists.

Were made by letters patent.

Before the *Stat. of W. 2. c. 10.* all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be attorney to such a one. *2 Inst 249.* That statute gave all persons liberty of appearing by attorney without any letters patent, otherwise they were to appear each day in court in their proper person; in consequence of which, great numbers of attornies were admitted by the judges, whereby many unskillful ones practised, which occasioned many mischiefs: for restraining of which, it was enacted by *Stat. 4 H. 4. c. 18.* "*That the judges should examine them, and at their discretion to put those who were virtuous and of good fame on the roll, and those on the contrary to strike out.*" And the *Stat. 33 H. 6. c. 7.* limited the number in *Norfolk* and *Suffolk.* The attornies of *B. R.* are of record as well as the attornies of *C. B.* *1 Rol. 3.* and it is now the common course for the plaintiff or defendant to appear by attorney, *F. N. B. 26. D.* But where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person. *Ibid. 262.* Outlawry is excepted by *Stat. 4 & 5 W. & M. c. 18.*

Judges to examine them, &c.

To take the oaths.

By *13 W. 3. c. 6.* attornies are to take the oaths to government, under penalties and disability to practise.

12 G. 1. c. 29. If any who hath been convicted of forgery, perjury, subornation of perjury, or common barrettry, shall practise as an attorney, or solicitor or agent in any suit or action brought in any court of law or equity within *England*, the judge hath power to transport the offender for seven years, by such ways, and under such penalties, as felons.

If an attorney convicted of forgery, &c. shall practise, judge to transport.

No person after 1st *December* 1730, to act as an attorney, or sue out any writ, or commence, carry on, or defend any action, &c. either before or after judgment in the name of any other person in the king's bench, common pleas, or exchequer, dutchy of *Lancaster*, or in any of the courts of great sessions of *Wales*, or of the counties palatine, or in any other court of record in *England*, where attornies have been accustomably admitted and sworn, unless such person shall take the oath appointed to be taken, and shall be admitted and inrolled before 1st *Dec.* 1730, in such of the said courts where he shall act as an attorney, or shall be sworn, admitted, and inrolled in the said courts. 2 *Geo.* 2. c. 23. s. 1.

No person to commence any action or defend without being sworn and inrolled in one of the courts.

Any one or more of the judges of the said courts respectively, shall before they admit such person to take the said oath, examine and inquire touching his fitness, &c. and if satisfied that he is qualified, then to administer the oath, and after such oath taken, cause him to be admitted an attorney of such court respectively, and his name to be inrolled as an attorney without fee, except 1s. for the oath: the admission to be written on parchment, and signed by such judge or judges respectively, wherein the usual stamp shall be first impressed and delivered to the person admitted. s. 3. The stamp now is 8l. 23 *Geo.* 3. c. 58.

Any judge before admission to examine if he be qualified; if so, then to administer the oath, &c.

Admission.

The like clause as the first respecting persons soliciting suits in the court of chancery, court of equity, in the exchequer chamber, court of the dutchy of *Lancaster* at *Westminster*, or courts of the counties palatine of *Chester*, *Lancaster*, or *Durham*,

The like clause respecting solicitors.

ham, or in any inferior court of equity in *England*.
Sec. 4.

Sec. 5. The master of the rolls, two of the masters in chancery, the barons of the court of exchequer, the chancellor of the dutchy of *Lancaster*, and the judges of the other courts of equity, or any one or more of them, shall examine before they admit the person to take the oath touching his fitness and capacity to act as a solicitor, &c. and if satisfied, to administer the oath, &c. and cause him to be admitted a solicitor, &c.

None to act unless bound by contract for five years to a sworn attorney.

No person shall be admitted to act as an attorney, or sue out any process or defend any action in the name of any other person, in any of the courts of law aforesaid, unless such person shall have been bound by contract in writing to serve as a clerk for five years, to an attorney duly and legally sworn and admitted in some or one of the said courts, and such person during the said term of five years, shall have continued in such service; and also unless such person, after the expiration of the said five years, shall be examined, sworn, and inrolled, as before required. *Sec. 6.*

Judge to examine.

The judges, before they admit such person, are to enquire touching his fitness and capacity, and if satisfied, are to administer the oath, and cause him to be admitted and inrolled. *Sec. 7.*

Solicitors.

The like with respect to persons who are to be admitted solicitors in the courts of equity. *Sec. 8 & 9.*

An attorney of this court may sue in any other, with consent of an attorney of that court.

An attorney admitted in any of the said courts of law, or as a solicitor in any of the said courts of chancery, with the consent of any attorney in any of the said other courts, such consent being in writing signed by such attorney, and in the name of such attorney, to sue out any writ, or commence, carry on, prosecute, or defend any action or proceeding in such court, notwithstanding such person is not sworn or admitted to be an attorney of such court. *Sec. 10.*

No

No attorney shall have more than two clerks at one and the same time, who shall be bound by contract in writing to serve as clerks. *Seet. 15.*

Not to have more than two clerks.

The prothonotaries of this court and the secondary of the king's bench, &c. to have three clerks at the same time, and no more; and such clerks having served *five years*, may be admitted the same as any other clerk. *Seet. 16.*

An attorney of this court may, by the clause of the statute, carry on proceedings in the court of great sessions of *Wales*, in the name of an attorney of that court, and declare for business and fees. *Barnes 160. Hatchett one, &c. against Hughes.*

May carry on proceedings in Wales by consent.

If any sworn attorney of this court shall knowingly and willingly permit or suffer any other person to sue out any writ, or commence or defend any action in his name, not being a sworn attorney, or a sworn solicitor in chancery, &c. and shall be thereof convicted, he shall, from the time of such conviction, be disabled from practise, and his admittance to be void. *Seet. 17.*

Sworn attornies permitting those that are not to issue out writs, disabled from practice.

The clerk of the warrants of the common pleas is, without fee or reward, to inroll the name of every person who shall be admitted an attorney, and the time when, in rolls or books, to which all persons shall have recourse without fee or reward. *Seet. 18.*

Attornies to be inrolled.

A sworn attorney of this court may be sworn, admitted, and inrolled, a solicitor, in all or any of the courts of equity, without any fee for the oath, or any stamp, if the master of the rolls, &c. shall, on examining him, be satisfied that such attorney is duly qualified to be so admitted. *Seet. 20.* A sworn solicitor in one court of equity, may be admitted into any other court. *Seet. 21.*

A sworn attorney may be admitted a solicitor.

Any person in his own name, or in the name of any other, suing out any writ, or commencing or defending any action, &c. in any of the courts of law or equity, mentioned in the said act, as attorney or solicitor, in expectation of any gain, fee, or reward, without being admitted, shall forfeit 50*l.*

Attorney, &c. in their own name suing out any writ, &c. not inrolled, forfeit 50*l.*

to

to the use of the person who shall prosecute, and be made incapable to maintain any action for any fee, reward, or disbursements, on account of prosecuting or defending such action, &c. *Sect. 24.*

Quaker.

A quaker having served a clerkship for five years, as before mentioned, to an attorney or solicitor, may be admitted an attorney on his affirmation, 12 Geo. 2. c. 13. s. 18.

The oath.

I A. B. do swear that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.

So help me God.

No attorney being a prisoner, to commence or prosecute any action.

No attorney who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall, during his confinement, in his own name, or in the name of any other, sue out any writ or process, or commence or prosecute any action or suit, and all proceedings in such action or suit shall be void and of no effect; and such attorney so commencing or prosecuting any action or suit as aforesaid, shall be struck off the roll, and be incapacitated from acting as an attorney for the future. And any attorney permitting or empowering any such attorney as aforesaid, to commence or prosecute any action or suit in his name, shall be struck off the roll, and be incapable from acting as an attorney for the future. *Stat. 12 Geo. 2. c. 13. s. 9.*

Any attorney permitting, &c.

Not to extend to suits before confinement.

This not to prevent any attorney confined as aforesaid, from carrying on or contracting any suit or suits commenced before the confinement of such attorney. *Sect. 14.*

May commence an action on a bail bond.

After action commenced by an attorney he becomes a prisoner, then the bail bond is assigned, and he being still a prisoner commences an action on the bail bond; this has been held to be a continuance of the original suit commenced before the attorney became a prisoner. *Wheetam v. Needham, Barnes 46.*

It

It has also been held that the above act relates only to *prosecuting*, and not to the *defending of suits*. Relates to prosecution.
Longman v. Rogers, Barnes 263.

Persons bound *clerks to attornies, or solicitors*, are to cause *affidavits* to be made and filed of the execution of the articles within *three months next after the date thereof*; and in every such affidavit, shall be specified the *names of every such attorney and solicitor*, and of every such person so bound, and their places of abode respectively, together with the day of the date of such articles; and every such affidavit shall be filed within the time aforesaid, in the court where the attorney or solicitor to whom every such person respectively shall be bound as aforesaid, hath been inrolled as an attorney or solicitor with the proper officer; and none to be admitted before such affidavit be produced and read in court. 22 Geo. 2. c. 46. s. 3, 4.

Persons bound to serve as clerks to attornies to cause affidavit to be made within three months after execution of contract.

In this court the clerk of the warrants, or his deputy, shall be the proper officer for filing such affidavits, *sect. 5.*; and shall keep a book, wherein shall be entered the substance of such affidavit, specifying the names and places of abode of every such attorney and clerk, and of the person making such affidavit, with the date of the contract, and the days of making and filing such affidavit; and may take, at the time of filing such affidavit, 2s. 6d. for his trouble; which books may be searched gratis. *Sect. 6.*

None to be admitted before such affidavit produced.

Who are to file such affidavits. Books to be kept, &c.

No attorney shall have, take, or retain any clerk, who shall become bound by contract in writing as aforesaid, after such attorney shall have discontinued or left off, or during such time as he shall not actually practise or carry on the business of an attorney. *Sect. 7.*

No attorney to take a clerk after discontinuing business.

Every person who shall become bound, &c. shall, during the whole time, or time of service, to be specified in such articles, continue and be actually employed by such attorney or solicitor, or his or their agent or agents, in the proper business, practice, or employment of an attorney or solicitor. *Sect. 8.*

Clerk to be employed the whole time.

Provided

If, before the expiration of the time, the attorney die, &c. or the clerk be discharged by, &c.

and be bound to serve for the remainder of the time;

such service to be good, if affidavit be made and filed, &c.

Before admittance of an attorney affidavit to be made and filed of actual service.

Attorney acting as agent, or permitting his name to be used, or sending any process to any unqualified person, thereby to enable him to appear or act as an at-

Provided if any such attorney, to or with whom any such person shall be so bound, shall happen to die before the expiration of such term, or discontinue or leave off his practice, or if such contract shall, by mutual consent of the parties, be cancelled, or such clerk shall be legally discharged by rule of the court, before the expiration of such term; and the said clerk shall, in any of the said cases, be bound by another contract or contracts in writing to serve, and shall accordingly serve in manner before mentioned, as clerk to any other such practising attorney or attornies as aforesaid, during the residue of the said term of five years, then such service shall be deemed and taken to be as good, effectual, and available, as if such clerk had continued to serve as a clerk for the said term to the same person to whom he was originally bound, *so as affidavit be duly made and filed of the execution of such second contract or contracts, within the time and in like manner as is before directed, concerning such original contract.* Sect. 9.

Every person who shall become bound as a clerk as aforesaid, shall, before he be admitted an attorney, cause an affidavit of himself, or such attorney to whom he was bound as aforesaid, to be duly made and filed with the officer before appointed, that he *hath actually and really served and been employed by such practising attorney, to whom he was bound as aforesaid, or his agent, during the said whole term of five years.* s. 10.

N. B. The master is to take care that the stamp duties be paid, if in town *within one month*, if in the country, *within two months.* 5 Geo. 3. c. 46. s. 19. s. 41.

If any sworn attorney shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or

or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence such process did issue, and proof made thereof upon oath to the satisfaction of the court, that such sworn attorney had offended therein as aforesaid, then every such attorney so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor, and in that case, and upon such complaint and proof made as aforesaid, it shall be lawful for the said court to commit such unqualified person, so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year. *f. 11.*

torney, to be struck off the roll.

No person shall act as a solicitor, attorney, or agent, or sue out any process at any general or quarter sessions of the peace, either with respect to matters of a criminal or of a civil nature, unless such person shall have been heretofore admitted an attorney of one of the courts of record at *Westminster*, and duly inrolled pursuant to *Stat. 2. Geo. 2. c. 23*; or be hereafter admitted an attorney, and inrolled as aforesaid, pursuant to this act, or such other law as shall be then in being; and unless such person shall continue so entered on the roll at the time of such his acting in the capacity aforesaid: but every person who shall so act, not being admitted and inrolled as aforesaid, shall be subject to a penalty of fifty pounds, to be recovered by action of debt, bill, &c. by any person who shall sue for the same, within twelve months after the offence committed, with treble costs of suit. And if any attorney shall permit any person, not being admitted and inrolled as aforesaid, to make use of his name in the courts of general or quarter sessions as aforesaid, such attorney shall be subject to the like penalty of fifty pounds, to be recovered as aforesaid. *Sett. 12.*

None but attorneys admitted to practise at general or quarter sessions.

Provided that nothing herein contained shall extend to deprive the attornies of the duchy of *Lancaster*, or of the courts of *great sessions* in *Wales*, or

Persons exempted.

of the *counties palatine of Chester, Lancaster, and Durham*, from acting within their respective jurisdictions. *Sec. 13.*

Alphabetical book to be kept to enter the names and places of abode of the attornies.

The clerk of the warrants is to cause an alphabetical book to be prepared and kept in his office, for inspection *gratis*; wherein every practising attorney, resident in *London or Westminster*, or within ten miles thereof, shall have his name and place of abode, or some place within the said cities, or one of them, where he may be served with the proceedings of the court, to be entered; and as often as any attorney shall change the place where he may be served as aforesaid, he shall make the like entry thereof in the said book; and all proceedings which do not require personal service shall be deemed sufficiently well served if a copy thereof shall be left at the place last entered in such book, with any person there; and on no such entry being made, then fixing up any of the said proceedings in the prothonotary's office (unless personal service be required), shall be deemed sufficiently served. *R. Hil. 9 Geo. 3.*

If no entry made fixing up in the office.

As many attornies have no certain place of residence, any place where he may be served, though not his actual place of abode, is sufficient. But when the *name and place* of abode is entered, then service at that place is the proper service. *Loft. Rep. 357. This in K. B.*

Attorney not attending, to have no privilege.

An attorney that has not been attending his employment in this court by the space of *one year*, unless hindered by sickness, shall not be allowed his privilege of an attorney. *R. M. 1654. Sec. 1.*

Attornies dismissed.

Attornies dismissed by one court from their practice for misdemeanor, be not (after certificates) admitted to practise in another court, it being contrary to the intent of the law. *Ibid.*

Attorney to pay 1s. 4d. a term.

Every attorney of the court pays to the clerk of the warrants *8d. a term*; viz. *4d. a term* for the puisne judges (to be distributed in charity), and *4d. a term* for the cryers of the court. And when

any attorney brings a writ of privilege or attachment to be marked, or warrant of attorney to be filed, he must pay the arrears (if any) of his termage.

By stat. 25 Geo. 3. c. 80. after the first of November 1785, every solicitor, attorney, notary, proctor, agent, or procurator, admitted, inrolled, or registered in any of his majesty's courts at *Westminster*, or in any ecclesiastical court, or in any of the courts of admiralty or cinque ports, or in any of his majesty's courts in *Scotland*, the great sessions in *Wales*, or in any courts in the counties palatine, or in any court in *Great Britain*, holding pleas, where the debt or damage shall amount to 40s. or more, shall, previous to his commencing or defending any suit or prosecution, take out annually a certificate of such his admission, inrolment, or register:

That for and upon every such certificate so taken out by any solicitor, &c. who shall reside in any of the inns of court, or in the cities of *London* or *Westminster*, the borough of *Southwark*, the parish of *Saint Pancras*, and *Saint Mary le Bone*, or within the bills of mortality, or within the city of *Edinburgh*, there shall be charged a stamp-duty of 5l. and in any other part of *Great Britain*, 3l.

After the first of November 1785, every person admitted, sworn, inrolled, or registered a solicitor, attorney, &c. in any one or more of the courts aforesaid, who shall commence, carry on, or defend any action, suit, or prosecution therein, shall annually, during such time as he shall continue so to practise therein, deliver into some one of the courts in which he shall have been admitted, sworn, inrolled, or registered, in such manner as is herein-after directed, a paper or note, in the proper hand-writing of every such solicitor, &c. containing his name and usual place of residence, and marked and stamped with the proper mark or stamp denoting the duty herein-before imposed upon certificates, according to the place of such his residence as aforesaid; and thereupon every

Certificates to be taken out annually by every solicitor practising in any court holding plea for 40s. and upwards.

Those residing in *London* and *Westminster*, the bills of mortality, or *Edinburgh*, to pay 5l. for a certificate.

any other part, 3l.

From Nov. 1, 1785, every acting solicitor, &c. shall annually deliver in a note of his name and residence, &c. in order to obtain a certificate.

such solicitor, &c. shall be entitled to have a certificate (if the same shall be required) in the manner herein-after directed. *Sett. 3*

Officers for entering applications for certificates in *England*.

The chief clerk of the king's bench, or his deputy; the clerk of the warrants in the court of common pleas, or his deputy, the clerk of the pleas in the exchequer office of pleas, or his deputy, the prothonotaries of the respective counties palatine of *Lancaster*, *Chester*, and *Durham*, and of the great sessions in *Wales*, or their respective deputies, and such officers of the inferior courts of law as the judge or judges of the inferior courts respectively shall appoint, the senior clerk of the petty bag office in the court of chancery, or his deputy, the king's remembrancer of the court of exchequer, or his deputy, the chief clerk of the dutchy chamber of *Lancaster*, or his deputy, the register of the respective courts of equity in the said counties palatine, and of the great sessions in *Wales*, or their deputies, shall, and they are hereby required, from time to time, upon payment of 1s. to enter the name and place of residence of such attorney, &c. and who shall have delivered in such paper or note in writing, duly stamped and required, a certificate of his inrolment as expressed, in rolls or books to be provided and kept for that purpose in the said several and respective offices: and such officers shall subscribe to every such paper or note in writing, so delivered in, a certificate signed by every such officer respectively, according to the form of the schedule annexed; to all which said rolls or books, in the said courts respectively, all persons shall and may, at all seasonable times, have free access, without fee or reward. *Sett. 4.*

Entering officers to certify notes delivered.

Entering officers, &c. to issue annual certificates, which must be renewed ten days before expiration.

Every certificate shall bear date on the day on which the same was issued, and shall endure and remain in force for the space of twelve calendar months, to commence from the first of *November 1785*, upon all certificates to be issued on or before that day, and upon certificates to be first issued to any person or persons, after the said first day of *November 1785*, to commence from the date of

every such certificate; which said certificate shall be renewed at least ten days previous to the expiration of the time for which it was granted, and so yearly and every year, so long as such solicitor, &c. shall continue to practise in any such court in manner as aforesaid. *Sec't. 5.*

Persons residing in any of the *Inns of Court*, or in the cities of *London* or *Westminster*, or the borough of *Southwark*, the parish of *Saint Pancras*, or *Saint Mary-le-bone*, or within the *bills of mortality*, or within the city of *Edinburgh*, for the space of *forty days*, or more, in any one year, every such solicitor, &c. shall be deemed to be resident within the limits of the different districts, and shall be liable to the higher duties imposed on certificates, notwithstanding such solicitor, &c. shall or may at other times in each such year, reside elsewhere without the limits last mentioned. *Sec't. 6.*

Persons residing forty days in a year within the limits of the higher duties, are to pay the same.

Penalty of 50*l.* on every person who shall, in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit, or any proceedings as a solicitor, &c. in any of the courts aforesaid, for or in respect of any gain, fee, or reward, without having obtained such certificate, or shall deliver in to the respective officers appointed any false or fictitious place of residence, with intent to evade the payment of the higher duties; and made incapable to maintain or prosecute any action in any court of law, or equity, for the recovery of any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding. *Sec't. 7.*

Penalty on acting without certificate, or giving in a false place of residence.

Any person having duly obtained a certificate, may sue or defend any action in the name and by consent of any other solicitor, &c. of such court in writing first had and obtained, and signed by him in like manner as he might have lawfully done before this act, provided such solicitor, &c. in whose name such proceedings shall be instituted, commenced, or carried on, shall also have first duly ob-

Persons having taken out certificates may act for others who have also taken them out.

tained a certificate out of the court wherein he is sworn, &c. in manner as herein-before is directed; or in default thereof, every such solicitor, &c. shall be liable to the like penalties, &c. as any other solicitor is by this act made subject and liable to. *Sec. 8.*

Person under one certificate may act in any other court in which he is sworn, &c.

It shall and may be lawful for any person duly sworn, admitted, &c. a solicitor, &c. in any two or more of the said courts respectively, under a proper certificate obtained from either of the said courts respectively, to commence or defend any action or suit in any of the said other courts in which he is so sworn, &c. although such certificate shall or may not have issued from such other court, *Sec. 9.*

Notes.

Not to be lessor or bail.

No attorney to be lessor in an ejectment, nor bail for a defendant in this court. *Rule, M. 1654. R. M. 6 Geo. 2.*

No attorney to be changed without rule or order.

No person, without rule of court or order of a judge, and notice to the adverse party or his attorney, shall change or shift his attorney; and such attorney newly coming in, to take notice at his peril of the rules whereunto the former attorney was liable, had he continued. *Mich. 1654.*

Nor until bill is paid.

This court will not permit an attorney to be changed in a cause, and another appointed in his stead, until his bill of fees and disbursements be settled and paid. *Langley v. Stapleton, Barn. 40.*

Country attorneys.

Where country attorneys are concerned, declarations, pleas, and other proceedings should not be delivered and carried on in the country, but by the agents in town. *Mountstephen v. Templer, Cooke's Rep. 94. 101. 123. Barn. 251. Taylor v. Lawson.*

Rule to plead.

If the agent of the plaintiff's attorney gives the agent for the defendant time to plead, the country attorney cannot sign judgment till that time be expired. *Wallace v. Willington, Barnes 256.*

A plea

A plea being delivered in the country held to be ^{Plea,} bad, and judgment may be signed. *Taylor v. Lawson, Barnes 251.*

If the country attornies agree that the issue shall ^{Issue,} be delivered in the country, and it is notwithstanding tendered in town, and not paid for by the agent, judgment may be signed, for the agreement is void. *Hafelfoot v. Duke, Barnes 251.* But where the defendant pleads by his attorney in the country, and the plaintiff's attorney accepts it, there he may tender the issue in the country, and if not paid for there, may sign judgment. *Moore v. Hodgson, Barn. 239.*

Notice of trial on the issue book must be given ^{Notices of trial, &c.} to the agent, because the issue can be no where delivered but in town. Notices of *trial* and *countermands*, *notices of executing writs of inquiry* and *countermands*, may be given either to the attorney in the country, or to the agent in town. *Tashburn v. Havelock, Barnes 306.*

By Stat. 1 H. 5. c. 4. It is enacted, that no ^{No sheriff, &c. to be attorney, &c.} sheriffs, sheriff's clerk, receiver, nor sheriff's bailiff, be attorney in the king's courts, *during the time that he is in office with any such sheriff.*

An attorney in the country is answerable for ^{Answerable for agents.} the mistakes of his agent. *Collins v. Griffin, Barnes 37.*

If an attorney be retained, his authority continues till the end of the cause, or a countermand. ^{Authority.} 1 Roll. 291. l. 25.; and it cannot be countermanded without a rule of court, or a judge's order. He may sue execution within the year, without a new warrant, 2 Inst. 378. and may prosecute it after the year, *ibid*, but not bring a *sci. fa.* 1 Salk. 39. So he may acknowledge satisfaction on receipt of the money. 1 Roll. 366.

If an attorney die, or be removed, the justices ^{If he dies.} shall make another in his place. Stat. 4 H. 8. c. 18.

The clerk of the warrants to certify to the seal ^{Attornies who have discontinued forejudged,} office, the names of such attornies that have discontinued,
H 4

or put out of roll, not to have a writ of privilege or attachment.

continued, and are forejudged the court, and put out of the roll, and have not filed any warrant of attorney, nor continued their names upon the roll for above four terms past; and thereupon no such person shall have a writ of privilege or attachment sealed, until they have the said writ signed by the clerk of the warrants, to testify that their names are on the roll, for which no fee is to be paid, *R. Trin. 29 Car. 2.*

8d. a term for his termages.

Every attorney pays to the clerk of the warrants 8d. a term, 4d. to the puisne judges (to be distributed in charity) and 4d. for the criers of the court.

If struck off.

If an attorney is struck off, and is restored, he must consent not to take advantage of his privilege against any action then depending. *Moody's case, Barnes 42.*

Admitted fraudulently to be struck off.

An attorney admitted fraudulently, was struck off the roll, and an attachment was granted against the master. *2 Black. Rep. 991. Ex parte Hill and Hargrave.*

Not privileged from serving in the militia.

Attornies are not privileged from serving in the militia, or paying for substitutes in their stead. *Ibid. 1123. Gerrard's case.*

Attornies of different courts,

Where an attorney of one court, sues an attorney of another, the privilege of that court which is possessed of the cause, shall be preferred. *Ibid. 1325. Danfer one, &c. v. Berryman.*

Attornies liable to be punished in a summary way.

They are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill practice, attended with fraud and corruption, and committed against the obvious rules of justice, and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears that the matter complained of was rather owing to neglect or accident, than design: or if the party injured, has other remedy by act of parliament, or action at law. *12 Mod. 251. 318. 440. 583. 657.*

Also for base and unfair dealings.

They are also liable to be punished for base and unfair dealings towards their clients in the way of business,

business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their clients writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their clients use, and for other such like gross and palpable abuse. 2 *Haw. Pl. of the Cr.* 144. 8 *Mod.* 306. 12 *Mod.* 516.

An action lies against an attorney for neglecting to charge a person in execution at his client's suit, according to a rule of court; although it seems it was rather want of judgment than negligence. 2 *Wils.* 325. *Russell v. Palmer*; but the court will not proceed against him for it in a summary way. 4 *Burr.* 2060.

Action lies against him for neglect.

An attorney is not liable to be sued if he neglect to plead, provided it be a just debt due to the plaintiff, otherwise the court will punish the attorney. *Barnes* 39. *Anon.*

Not liable if he neglect to plead if it is a just debt.

Not bound to discover and give in evidence the contents of a deed shewn by his client, nor any instructions given him by his client; nor can he be forced to act against his will.

Not bound to discover, &c.

Trespass for breaking and entering house against *Noble, Lett, and Byrne*. Lett and Byrne suffered judgment to go by default. Noble went on to trial, and obtained a verdict. Damages were assessed against Lett and Byrne at $\frac{1}{2}d.$ each. Motion why the costs, which might be taxed against Lett and Byrne on the judgment by default, and the damages assessed, should not be deducted out of the costs taxed to Noble on the *posse*, and allowed to the plaintiff, and in the mean time execution against them stayed. This moved on affidavit, stating that Lett and Byrne had acted under the authority of Noble, who had undertaken to pay the damages and costs. Against the rule it was said, that it tended to deprive the attorney

Verdict for one defendant, judgment by default, and halfpenny damages against others. The court permitted the costs, &c. on judgment by default, to be deducted from the costs taxed on the *posse*, and allowed to the plaintiff.

torney of that lien on the costs, to which he was legally intituled. But the court held, *that the attorney can only have such a lien on the costs as is subject to the equitable claims of the parties in the cause, and made rule absolute.* *Schaale v. Noble and others.* 1 *H. Black. Rep.* 23.

May detain writings, &c. until paid.

An attorney or solicitor, having fees due to him, may detain writings until his just fees are paid; but if there are none due to him, the court, on motion, will compel the delivery of them. 1 *Lill.* 148.; but he cannot detain writings which are delivered upon special trust, for the money due to him in that very business. *Mod. Caf. L. and Eq.* 306. If a man hath a joint cause of action against two, one an attorney, and the other not, he may arrest both, and declare as usual. 2 *Salk.* 544. 2 *Lev.* 129.

An attorney has a lien for his bill of costs on money levied, notwithstanding a docquet has been struck against the client becoming a bankrupt.

In *Michaelmas* term the plaintiff recovered judgment for 252*l.* 5*s.* 5*d.* sued out a *fi. fa.* to the sheriff of *Surry*, who levied the whole. Soon after defendant gave notice to the sheriff to retain the money levied, and that he should apply to the court to set aside proceedings for irregularity. On receipt of this notice, sheriff refused to pay plaintiff's attorney, who demanded it. Rule why the sheriff should not pay plaintiff's attorney the money with interest, on an affidavit that the whole sum was due to him for costs, as attorney for plaintiff, *viz.* part of the debt for which *Jaques* was taken in execution (which was the amount of costs taxed in an action brought by *Jaques* against the present plaintiff in the exchequer), and the remainder for the costs taxed in the action in this court against *Eyles*, for the escape of *Jaques.* *Atk.* 720. *Turwin v. Gibson.* *Dougl.* 226. *Welch v. Hole,* were cited. It appeared that a docquet had been struck against the plaintiff, who after he recovered judgment became a bankrupt. The court, on the authority of the last case, made rule absolute with costs, leaving out that part which respected interest; and

and said, that the circumstance of the docquet being struck, was immaterial. *Griffin v. Eyles*, 1 H. Black. Rep. 122.

If an attorney has been admitted and inrolled in chancery, he is entitled to practise of course on the equity side of the exchequer, and recover his fees though he is not admitted in that court. *Meddowcroft v. Holbrook*. 1 H. Black. Rep. 50.

An articulated clerk cannot be bail. *ibid.* 76.

How to proceed to file the articles and get admitted.

The affidavit of the due execution of articles is in my *Instructor Clericalis*, K. B. 5 edit. p. 73.

This affidavit is to be filed *within three months* (and if neglected there generally is an indemnity bill passes every year so as to give the clerk an opportunity of filing the same afterwards) with the clerk of the warrants, at his office, No. 3, Pump Court, Middle Temple: pay 2s. 6d. Before the clerk applies for his *fiat*, he gets this affidavit delivered him back again, by the clerk of the warrants: pay 2s. 6d. Take it with the *affidavit of service of clerkship* and articles, to one of the judges' clerks, who will introduce you to the judge, and on examination, the judge will grant his *fiat* for the admission: pay 10s. 6d. Then take same to Mr. Fotbergill, who will order his clerk to make out the admission: pay him 8l. 8s. He will order you to attend at Westminster-Hall in court to be sworn in, which generally is done at the sitting; pay the officers 2s. 6d.

How to proceed to file the articles and get admitted.

Trinity Term, 31 Geo. 3.

It is ordered, that from and after the last day of next Michaelmas Term, no attorney who is retained or employed as a writer or hackney clerk in the office of any attorney, and does not *really* and *bona fide* act as an attorney in his own right, shall (during the time of such his employ) take, or article any

New rules respecting attornies, and admissions of their clerks.

any clerk ; and no service under any articles during the time that such master shall be so employed in the office of any other attorney, shall be deemed a good service ; nor shall any clerk (under such circumstances) be intitled to be admitted as an attorney : *and*, to the intent that better information may be obtained touching the fitness and qualifications of the persons applying to be admitted attornies, *It is further ordered*, that from and after the said last day of Michaelmas Term next, every person who shall intend to apply for admission as an attorney of this court, shall, for the space of *one full term*, (*previous to the term in which such person shall apply to be admitted*,) cause his name and place of abode, and also the name and place of abode of the attorney with whom he has served his clerkship, to be written in legible characters, and affixed on the outside of the court of common pleas (in such place as public notices are usually affixed) ; and the same notice shall for the like space of time be left *at each of the judges chambers of the court of common pleas*, and shall there be fixed up in some conspicuous place ; and such notice shall likewise be fixed up for the like time in the *common pleas office* ; and that no person who has not regularly complied with the above order, shall in future be admitted as an attorney.

By the Court.

Affidavit of the
service.

A. B. of *Es.* gentleman, and C. D. of *Es.* severally make oath and say, And first this deponent A. B. for himself saith, that he this deponent hath duly served J. W. in the annexed articles mentioned for the space or term of five years in pursuance of the said annexed articles : and this deponent C. D. for himself saith, that he this deponent did, previous to the first day of Easter Term last, affix notices in writing upon the outside of the court of common pleas at Westminster-hall in such place as public notices are usually affixed, and also at the several judges chambers of this honourable court, and likewise in
the

the common pleas office, purporting that the said A. B. intended to apply as of the then next Trinity Term, to be admitted an attorney of this honourable court, and which said notices did contain the names and places of abode of the said J. W. and A. B. respectively.

N. B. This affidavit was sworn before Mr. J. Gould, and he granted his fiat.

Circuits.

The courts of
assize and nisi
prius.

THE courts of *assize* and *nisi prius* are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except *London* and *Middlesex*, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are taken only once a year), to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of *Westminster Hall*. These judges of assize came into use in the room of the ancient justices in eyre, who were regularly established, if not first appointed, by the 22 *H. 2.* with a delegated power from the king's great court, or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in seven years, for the purpose of trying causes. *Co. Litt.* 93. The present justices of *assize* and *nisi prius* are derived from the *Stat. of 13 Ed. 1. c. 30.* explained by several other acts, particularly the *Stat. 14 Ed. 3. c. 16.*; and must be two justices of the one bench or the other, or the chief baron of the exchequer, or the king's serjeants sworn. They usually make their circuit in the respective vacations of *Hilary* and *Trinity Terms*, assizes being allowed to be taken in the holy time of *Lent*, by consent of the bishops at the king's request, as expressed in the *Stat. of Westm. 1. 3 Ed. 1. c. 51.*

Formerly a judge could not act in the commission of oyer, &c. within his own county, &c. but now may be a justice of oyer, &c.

Formerly it was held, that no judge or other lawyer could act in the commission of oyer and terminer, or in that of gaol delivery, within his own county, where he was born, or inhabited. 8 *R. 2. c. 2.* 33 *H. 8. c. 24.* But that local partiality,

partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper, by the Stat. 12 Geo. 2. c. 27. to allow any man to be a justice of oyer and terminer and general gaol delivery within any county of England.

The judges sit by virtue of five several authorities: 1. *The commission of the peace*: 2. *A commission of oyer and terminer, to hear and determine all treasons, felonies, and misdemeanors*: 3. *A commission of general gaol delivery*, which empowers them to try and deliver every prisoner who shall be in the gaol when the judges arrive at the circuit town, whenever indicted, or for what crime committed: 4. *A commission of assize*, directed to the judges and clerk of assize, to take assizes; that is, to take the verdict of a peculiar species of jury, called an assize, and summoned for the trial of landed disputes: 5. *That of nisi prius*, which is a consequence of the commission of assize being annexed to the offices of those justices by the Stat. of Westm. 2. 13 Ed. 1. c. 30.; and it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. The original of the name is this: all causes commenced in the courts of Westminster Hall, are, by the course of the courts, appointed to be there held, on a day fixed in some Easter or Michaelmas Term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius justiciarum ad assisas capiendas venerint*; unless the day before prefixed, the judges of assize come into the county in question.

Judges authority.

The original name of *nisi prius*.

This they are sure to do in the vacations preceding Easter and Michaelmas term, and there dispose of the cause, which saves much expence and trouble both to the parties, the jury, and the witnesses.

When assizes are held.

The

The several counties in *England* are divided into six circuits, *viz.*

Circuits.

MIDLAND.

Northampton	Derby
Rutland	Leicester
Lincoln	Warwick.
Nottingham	

OXFORD.

Berks	Gloucester
Oxford	Monmouth
Hereford	Stafford
Salop.	Worcester.

NORFOLK.

Bucks	Cambridge
Bedford	Norfolk
Huntingdon.	Suffolk.

WESTERN.

Southampton	Cornwall
Wilts	Devon
Dorset	Somerset.

HOME.

Hertford	Suffex
Essex	Surrey.
Kent	

NORTHERN.

York	Cumberland
Durham	Westmore-
Northumber-	land
land	Lancashire.

Officers.

The officers belonging to the circuits are, the clerk of the *assize*, *associate*, clerk of arraigns, clerk of indictments, judges marshal, cryer, clerk, and tipstaff.

Sheriff and coroner to attend the judges.

The *sheriff* of each county, and his *deputy*, are to attend the judges; the *coroners* also attend to deliver in all inquisitions, &c. to the clerk of assize in court, and return all writs of *venire*, *distringas*, and *habeas corpora*, where the *sheriff* is a party in the suit.

Clerks of *assize* and *associates* for the several circuits are,

Names of Clerks of assize, &c.

Home. — Gould, Esq. Associate, Mr. Knapp.

Midland. John Blencowe, Esq. Associate, Mr. Forbes.

Norfolk. G. D. Fleetwood, Esq. Associate, Mr. Bury.

Northern. John Riggs, Esq. Associate, Mr. J. F. Hilditch.

Oxford.

Circuits.

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Oxford. Meredith Price, Esq. Associate, Mr.
B. Brice.

Western. John Follett, Esq. Associate, Mr.
Vandersee.

No clerk of assize shall act as counsel on the
circuit on pain of 10*l*. 33 *H. 8. c. 24.*

Of the Terms.

Terms

THE *Terms* are those spaces of time, wherein the courts of justice are open, for all that complain of wrongs or injuries, and seek their rights by course of law or action, in order to their redress; and during which the courts of *Westminster Hall* sit, give judgment, hear complaints, &c.

These *terms* are supposed, by *Selden*, to have been instituted by *William the Conqueror*; but *Spelman* hath shewn that they were gradually formed from the canonical constitutions of the church; being no other than those leisure seasons of the year which were not occupied by the greatest festivals or fasts; or which were not liable to the general avocations of rural business.

Formerly the
whole year one
term.

In very early times the whole year was one continual term for hearing and deciding causes; but when our legal constitution came to be settled, the commencement and direction of our law terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of king *Edward the Confessor*, "That from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost; and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of holy church should be kept throughout all the kingdom." And so extravagant afterwards the regard that was paid to these holy times, that though the author of the *Mirror* mentions only one vacation of a considerable length, containing the months of *August* and *September*, yet *Britton* is express, that in the reign of king *Edward I.* no secular plea could be held, nor any man sworn on the evangelists in the time of *Advent*, *Lent*, *Pentecost*, *harvest*, and *vintage*, the days of the great litanies, and all solemn festivals: but he adds, that the bishops and prelates did

nevertheless grant dispensations, of which many are preserved in *Rymer's Fœdera* of the time of king *Henry III.* that assizes and juries might be taken in some of these holy seasons, upon reasonable occasions. And soon afterwards a general dispensation was established in parliament, by *Stat. West. 1. 3 Ed. 1. c. 51.* which declares, that as it is great charity to do right unto all men at all times when need shall be, it is provided, "*That assizes of novel disseisin, mort d'ancestor, and darrein presentment, should be taken in Advent, Septuagesima, and Lent, even as well as inquests, and that at the special request of the king to the bishops.*" The portions of time not included within these prohibited seasons, fell naturally into a fourfold division, and from some festival or saint's day that immediately preceded their commencement, were denominated the terms of saint *Hilary, Easter, Trinity, and Michaelmas*; which terms have been since regulated and abbreviated by several acts of parliament, particularly *Trinity term*, by *Stat. 32 Hen. 8. c. 2.* and *Michaelmas term*, by *Stat. 16 Car. 1. c. 6.* and again, by *Stat. 24 Geo. 2. c. 48.*

If judgment be given in full term, it relates to the first day of the term. And the first day is the essoign day, for the *quarto die post* is a day of grace. *1 Bul. 35.* But if the essoign day happen to be Sunday, the judgment can only relate to the first judicial day. *1 Salk. 627.*

There are, in each of these terms, stated days, called days in bank, *dies in banco*, that is, days of appearance in this court, called usually *bancum*, or *commune bancum*, to distinguish it from *bancum regis*, which are generally at the distance of a week from each other, and regulated by some festival of the church. On some one of these days in bank, all original writs must be made *returnable*, and therefore they are generally called the returns of that term, whereof every term has more or less, said by the *Mirror, c. 5. f. 108.* to have been originally fixed by king *Alfred*, but certainly settled as early

In each of the terms there are stated days, called *dies in banco*.

On some of these days original writs are returnable.

as the *Stat. 51 Hen. 3. fl. 2.* But though many of the return days are fixed upon *Sundays*, yet the court never sit to receive these returns till the *Monday* after; and therefore no proceedings can be had, or judgment given on *Sunday*. *Salk. 627. 6 Mod. 250. 1 Jon. 156. 2 Lill. Abr. 569.*

The first return.

The first return in every term is, properly speaking, the first day in that term; as for instance, the *octave of St. Hilary*, or the *eighth day* inclusive after the feast of that saint; which falling on the 13th of *January*, the *octave*, therefore, or the *first day of Hilary term*, is the 20th of *January*, and thereon the court sit to take *essoigns*, or *excuses*, for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoign day* of the term. But the person summoned has *three days of grace* beyond the return of the writ, in which to make his appearance, and if he appears on the *fourth day inclusive*, it is sufficient. *2 Lill. Abr. 569. 1 Inst. 135.*

Essoigns,

These *essoigns* were allowed, to the end that no person might be surprised or prejudiced by his absence, provided he had just cause to be excused by any thing that was not owing to his own default. *Booth 14.* In real actions *essoigns* may be still cast, which are entered in the office of the clerk of the *essoigns*, where also the demandant may enter a *ne recipiatur*, if the *essoign* be not entered in time. But it is now settled there can be no *essoign* in a personal action.

Of the Terms and Returns.

Michaelmas Term, contains 3 weeks and 2 days, and hath 4 Returns.

By Original.

1. On the Morrow of all Souls.
2. On the Morrow of Saint Martin.
3. In eight days of Saint Martin.
4. In fifteen days of Saint Martin.

By Attachment of Privilege, Bill, &c.

1. On () next after the Morrow of All Souls.
2. On () next after the Morrow of Saint Martin.
3. On () next after eight days of Saint Martin.
4. On () next after fifteen days of Saint Martin.

Hilary Term, contains 3 weeks, and hath 4 Returns.

By Original.

1. In eight days of Saint Hilary.
2. In fifteen days of Saint Hilary.
3. On the Morrow of the Purification.
4. In eight days of the Purification.

By Attachment, Bill, &c.

1. On () next after eight days of Saint Hilary.
2. On () next after fifteen days of Saint Hilary.
3. On () next after the Morrow of the Purification.
4. On () next after eight days of the Purification.

Easter Term, which contains 3 weeks and 6 days, hath 5 Returns.

By Original.

1. In fifteen days of Easter.
2. In three weeks of Easter.
3. In one month of Easter.
4. In five weeks from Easter-day.
5. On the Morrow of the Ascension.

By Attachment, Bill, &c.

1. On () next after fifteen days of Easter.
2. On () next after three weeks from the day of Easter.
3. On () next after one month from the day of Easter.
4. On () next after five weeks from the day of Easter.
5. On () next after the Morrow of the Ascension.

Trinity Term, which contains 20 days, and hath 4 Returns.

By Original.

1. On the Morrow of the Holy Trinity.
2. In eight days of the Holy Trinity.
3. In fifteen days of the Holy Trinity.
4. In three weeks after the Holy Trinity.

By Attachment, Bill, &c.

1. On () next after the Morrow of the Holy Trinity.
2. On () next after eight days of the Holy Trinity.
3. On () next after fifteen days of the Holy Trinity.
4. On () next after three weeks of the Holy Trinity.

Of the Terms.

Every day in the term (except *Sundays*, or days on which the court do not sit) is a good return by bill: The court do not sit on the *Feast of the Purification*, *Ascension-day*, and *Midsummer-day*, unless it happens on *Friday* next after *Trinity Sunday*; then it must be adjourned to the next day. *Cræ. Jac. 16.*

Observations on the Terms.

Hilary Term.

HILARY Term begins 23d *January* (except it happens on a *Sunday*, then on the *Monday*), being always that day eight weeks from which *Michaelmas* Term ended; and ends *February* the 12th, if not *Sunday*, then on the *Monday*.

Easter Term.

Easter Term begins *Wednesday* fortnight after *Easter* day, and ends on the *Monday* next after *Ascension* day.

Trinity Term.

Trinity Term begins *Friday* after *Trinity Sunday*, 32 *H. 8. c. 21.* and ends *Wednesday* fortnight after, unless it happens on the feast of *Saint John the Baptist*, 24th *June*, which is no court day.

Michaelmas Term.

Michaelmas Term begins *November* 6th (except it happens on a *Sunday*, then the *Monday* after), and ends *November* 28th (if not *Sunday*; if *Sunday*, then 29th). 24 *Geo. 2. c. 48.*

The issuable Terms are *Hilary* and *Trinity*. So called because in them the records are for the most part made up of the issues joined in the various causes depending, and which are to be tried at the assizes that respectively follow these terms.

When no sittings at Westminster.

There are no sittings in *Westminster Hall* on *Ascension Day*, *Midsummer Day*, and 2d of *February*, the *Purification*.

Appearance days.

The first and last days of every term are the days of appearance.

Observations

Observations on the Returns of Writs.

ALL non-juridical days must be avoided in the return of process, as *Sundays*, the *Feast of the Purification* in *Hilary Term*, *Ascension Day* in *Easter Term*, and *Midsummer Day* in *Trinity Term*, *Saint John the Baptist*, if it so happen (unless it happens on *Friday* next after *Trinity Sunday*, for then it is *dies juridicus*, by *Stat. 32 H. 8. c. 21.*); writs returnable on any of those days would be void. So that if a writ be returnable on a *dies non juridicus*, on which it cannot be legally executed, it shall not be executed the next day, but is void. 6 *Mod.* 148. 196. *Sunday* is *dies non juridicus*. 6 *Mod.* 252.

What days are to be avoided on process.

The 11th day of *November*, being the *Feast of Saint Martin* in *Michaelmas Term*, cannot be said to be in or upon any return; and, if a writ be returnable on that day, it must be on *Thursday* the *Feast of Saint Martin*, or any other day of the week it falls on; and, if returnable the day after, *Friday* the morrow of *Saint Martin*.

All writs issuing out of this court, grounded upon original writs out of *Chancery*, must be made returnable on general return days, as on the *Morrow of the Holy Trinity*; but writs of *attachment*, and writs *subsequent* thereto, and writs grounded on *bills* filed against attornies, and such officers of the court as are entitled to the privilege of the court, or members of the *House of Commons*, writs of *Habeas Corpus*, &c. must be made returnable on a day certain in full term, as on *Friday* next after the morrow of the *Holy Trinity*.

Writs grounded on originals returnable on general returns. Attachments, &c. on days certain.

There must be at least *fifteen days* between the *teste* and *return* of all original writs returnable in this court, and between the *teste* and *return* of all ordinary writs sued and procured upon the same, except where altered by the following act of parliament.

Fifteen days between teste and return of original writs, and writs subsequent,

And attachments of privilege.

An attachment of privilege at the suit of an attorney, must also have *fifteen days* between the *teste* and *return*. *Pract. Reg.* 438. *Hayward, one, &c. v. Denison.*

Writs of ven. fac. hab. cor. ju. fi. fac. & ca. ad. fa. need not have fifteen days,

In all actions of debt, and other personal actions, actions of *ejectione firmæ* for lands or tenements, after issue joined to be tried by a jury, and after any judgment had or obtained, there shall not need to be *fifteen days* between the *teste* and return of any writ of *venire facias*, *habeas corpora juratorum*, writ of *fieri facias*, or writ of *capias ad satisfaciendum*; and the want thereof shall not be assigned for error; but not to extend to any writ of *capias ad satisfaciendum*, whereon an *exigent* after judgment is to be awarded, or to a *capias ad satisfaciendum* against the defendant, to make the bail liable. *13 Car. 2, c. 2. s. 6, 7.*

Except a *capias ad satisfaciendum* to ground an exigent, or to make bail liable.

Arrest.

AN arrest in a civil cause is defined to be, the Arrest.
apprehending or restraining one's person by
process, in execution of the command of some
court, or officer of justice. *Wood's Inst.* 575.

It must be by corporal seizing, or touching the What an arrest
is.
defendant's body. No word will make an arrest.
Any touching of the defendant's body is sufficient,
though the bailiff lays hold of his head, as he
holds it out of the window. 1 *Vent.* 306. But
even before the touching, if the bailiff gets peace-
able entrance at the outer door of the house, he
may break open any inner door to make the arrest,
though it be the door of a lodger; for inner doors
have no protection, but only outer doors and win-
dows, which are intended for the security of the
house. *Lee v. Gansel, Cow.* 1.

The bailiff need not be the hand that arrests, nor
need he be actually present, or even in sight, nor
within any precise distance of the person arrested;
but the arrest must be made by the authority of the
bailiff, who ought to be *quodam modo*, present at the
time. *Cow.* 65. Bailiff need not
be the hand that
arrests.

By *Stat. 12 Geo. 1. c. 29.* it is enacted, "That,
from and after the 24th day of June 1726, no per-
son shall be held to special bail upon any process is-
suing out of any superior court, where the cause of
action shall not amount to the sum of ten pounds,
or upwards; and that, in all cases where the cause
of action shall not amount to the sum of ten
pounds, or upwards, in any superior court (and the
plaintiff or plaintiffs shall proceed by the way of
process against the person), he, she, or they, shall
not arrest, or cause to be arrested, the body of the
defendant or defendants, but shall serve him, her, or
them, personally with a copy of the process. None to be held
to special bail in
a superior court
under 10l.

That

Where the cause of action amounts to 10l. affidavit to be made thereof, and the sum indorsed on the back of the writ.

That from and after the said 24th day of *June* 1726, in all cases where the plaintiff or plaintiffs cause of action shall amount to the sum of ten pounds, *affidavit* shall be *made* and *filed* of such *cause of action* (which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorised to take affidavits in such courts, or else before the officer who shall issue such process, or his deputy), which oath such officer, or his deputy, are hereby empowered to administer; and for such affidavit one shilling, over and above the stamp duties, shall be paid, and no more; and the sum or sums specified in such affidavit shall be indorsed on the back of such writ or process; for which sum or sums so indorsed, the sheriff or other officer to whom such writ or process shall be directed shall take bail, and for no more. But if, after the said 24th of *June* 1726, any writ or process shall issue for the sum of ten pounds or upwards, and no affidavit and indorsement shall be made as aforesaid, the plaintiff or plaintiffs shall not proceed to arrest the body of the defendant or defendants, but shall proceed in like manner as is by this act directed in cases where the cause of action does not amount to the sum of ten pounds, or forty shillings, or upwards, as aforesaid. *Ibid. Sect. 2.*

No arrest on a Sunday, except for treason, &c.

No person upon the *Lord's Day* shall serve or execute any writ, process, warrant, order, judgment or decree (except in cases of *treason, felony, or breach of the peace*), but that the service of such writ, &c. shall be void, and the person so serving or executing same, shall be liable to the suit of the party grieved, and to answer damages as if he had done the same without any writ, &c. 29 *Car. 2. c. 7. s. 6.* *Salk. 78. 5 Mod. 95. 6 Mod. 95.* But a person may be taken on an escape warrant on a Sunday. 2 *Salk. 626. 2 L. Raym. 1028.* Also bail may take their principal on a Sunday in order to surrender him. 1 *Atk. 239. 6. Mod. 251.*

Escape warrant.

Bail.

Capias

Capias returnable three weeks of *Easter*, being Sunday 29th of *April*. Monday 30th the officer arrested defendant at eight in the morning, and detained till ten, at which time the writ was renewed. Court discharged defendant. *Loveridge one, &c. v. Plaistow.* 2 *H. Black. Rep.* 29.

Arrest after writ return. Officer cannot detain till writ be renewed.

By the 11 & 12 *W. 3. c. 9. s. 2.* it is enacted, That no sheriff or other officer within the principality of *Wales*, or counties palatine, upon any writ or process issuing out of any of his majesty's courts of record at *Westminster*, shall hold any person to special bail, unless an affidavit be first made in writing, and filed in that court, out of which such writ or process is to issue, signifying the cause of action, and that the same is twenty pounds and upwards; and where the cause of action is twenty pounds and upwards, bail shall not be taken for more than the sum expressed in such affidavit.

No sheriff, &c. in *Wales*, &c. shall hold persons to special bail, unless the cause of action be 20*l.*

Not to be taken for more, &c.

By the 19 *Geo. 3. c. 70. s. 1.* it is enacted, That, from and after the 1st of *July* 1779, no person shall be arrested or held to special bail, upon any process issuing out of any inferior court, where the cause of action shall not amount to the sum of ten pounds, or upwards; but that copies of process shall be served (for the service of which process, a sum not exceeding two shillings and sixpence shall be allowed in costs), and the like proceedings shall be had thereupon in such inferior court, in all cases where the cause of action shall not amount to the sum of ten pounds, or upwards, as are directed to be had by the 12 *Geo. 1. c. 29.* in such inferior court, in all cases where the cause of action shall not amount to the sum of forty shillings. *Sec. 1.*

After 1st *July* 1779, no person shall be arrested, or held to special bail, upon any process issuing out of an inferior court for less than 10*l.*

That, from and after the 1st of *July* 1779, in all cases in such inferior court (having jurisdiction to the amount of ten pounds or upwards), where the cause of action shall amount to ten pounds, or upwards, the like affidavit shall be made and filed of such cause of action, and proceedings shall be had thereupon, as are directed by the said act of

Proceedings therein in causes of 10*l.* or upwards, and in causes of 40*s.* or upwards.

12 *Geo.*

12 Geo. 1. to be had, where the cause of action amounts to the sum of *forty shillings*, or upwards, in such inferior courts. *Secd. 2.*

No seaman shall be liable to be taken out of his majesty's service otherwise than for some criminal matter, unless the debt amounts to 20 l.

By 1 Geo. 2. c. 14. s. 15. it is enacted, That no person whatsoever, who shall list and enter himself to serve his majesty, as a seaman on board any of his majesty's ships or vessels, shall be liable to be taken out of his majesty's service by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, or for other just cause of action, and unless, before the taking out such process or execution, not being for a criminal matter, the plaintiff or plaintiffs therein, or some other person or persons on his or their behalf, *shall make affidavit before one or more judge or judges of the court of record, or other court, out of which such process or execution shall issue, or before some person authorized to take affidavits in such courts, that to his or their knowledge the sum justly due and owing to the plaintiff or plaintiffs, from the defendant or defendants in the action or cause of action, on which such process shall issue, or the debt or damage and costs for which such execution shall be issued out, amounts to the value of twenty pounds at the least, a memorandum of which oath shall be marked on the back of such process or writ, for which memorandum or oath no fee shall be taken; and, if any person shall be nevertheless arrested, contrary to the intent of this act, it shall and may be lawful for one or more judge or judges of such court, upon complaint made thereof by the party himself, or by any of his superior officers, to examine into the same by the oath of the parties, or otherwise, and by warrant under his or their hands and seals, to discharge such seaman so arrested, contrary to the intent of this act, without paying any fee or fees, upon due proof made before him or them, that such seaman so arrested was actually belonging to one of his majesty's ships or vessels, and arrested contrary to the intent of this act, and also to award to the party so complaining such costs as such judge or judges shall think reasonable; for the*

the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the said action might have had for the recovery of his costs, in case judgment had been given for him, with costs, against the defendant in the said action.

Stat. 16. That it shall and may be lawful to and for any plaintiff, upon notice first given in writing of the cause of action, to such seaman or seamen in his majesty's service, or left at his or their place of residence, before his entering into his majesty's service, to file a common appearance in any action to be brought for or upon account of any debt whatsoever, so as to entitle such plaintiff or plaintiffs to proceed therein to judgment and outlawry, and to have an execution thereupon, other than against the body or bodies of him or them so actually belonging to one of his majesty's ships, as aforesaid.

A seaman upon the ship books, though he has absented himself, is a seaman within the act.

Barnes 95. Studwell v. Bunton.

Armourers, gunners, &c. enlisted as common seamen are within this act. *Barnes 114. 1 Str. 2. 7.*

1 Black. Rep. 30.

By *Stat. 33 Geo. 3. c. 9. s. 65.* No person who is or shall list and enter himself as a volunteer in his majesty's service as a soldier, shall be liable to be taken by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, or other just cause of action, and unless before the taking out such process or execution (not being for a criminal matter), the plaintiff, or some person on his behalf, shall make affidavit, *That to his or their knowledge the original sum justly due and owing to the plaintiff from the defendant in the action, or cause of action, on which such process shall issue, or the original debt for which such execution shall be issued out, amounts to 20l. at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded; a*

memoran-

Plaintiff, upon notice, &c. may enter a common appearance, and proceed to judgment, &c.

No volunteer soldier liable to process, unless for a real debt of 20l.

Oath of the debt to be made before a judge, &c.

and a memorandum thereof marked on the back of the process.

memorandum of which oath shall be marked on the back of such process or writ: and, if any person shall be arrested contrary, it shall be lawful for one or more judge of such court, upon complaint made thereof by the party himself, or by any of his superior officers, to examine into the same by the oath of the parties, or otherwise, and, by warrant under his or their hands and seals, to discharge such soldier, without fee, upon due proof made that such soldier so arrested was legally enlisted as a soldier in his majesty's service, and arrested contrary to the intent of this act; and also to award to the party so complaining such costs as such judge shall think reasonable; for the recovery whereof he shall have the like remedy that the person who takes out the said execution might have had for his costs, or the plaintiff in the like action might have had for the recovery of his costs, in case judgment had been given for him with costs against the defendant in the said action.

Plaintiff may file common appearance, and proceed to execution against the goods.

Sec. 66. Any plaintiff, upon notice first given, in writing, of the cause of action to such person or persons so entered, or left at his or their last place of residence before such enlisting, to file a common appearance in any action to be brought for or upon account of any debt whatsoever, so as to entitle such plaintiff to proceed therein to judgment and outlawry, and to have an execution thereupon, other than and against the body or bodies of him or them so listed as aforesaid.

Serjeants are within this act as well as private men, so is a drummer. 1 *Black. Rep.* 29.

So a gunner in the train of artillery. *Str.* 7. So a trooper. *Ibid.* 2. So recruits just enlisted. Though these persons cannot be arrested, yet they may be surrendered by bail in their own discharge. 1 *Burr.* 339. This act does not extend to soldiers imprisoned for disobeying orders of justices, or on any other criminal account. 2 *Term Rep. K. B.* 270. Non-commissioned officers and privates have been held within the statute. *Ibid.*

If

If a person procure another to be arrested in the *Marshalsea*, or in any other court within *London*, &c. at the suit of any person where there is no such person known, or without the plaintiff's consent; every person who shall procure any arrest, &c. and shall be accused by indictment, presentment, or by the testimony of witnesses, or other due proof, shall suffer six months imprisonment, without bail or mainprize; and pay to the party arrested treble costs, and forfeit the sum of ten pounds for every such offence; to be recovered by action of debt, &c. against such person or persons, their heirs, executors, or administrators, as should or ought to pay the same by virtue or force of this act; in which action no essoin shall be allowed. 8 *Eliz. c. 2.* f. 4, 5.

The penalty for arresting of any person at the suit of another.

For what a person may be held to bail.

Where there is a *certain demand* which amounts to 10*l.* or upwards, as for money paid, laid out, and expended, money lent and advanced, money had and received, a demand on an account stated and settled, goods sold and delivered, work done, covenant for payment of money, money due on bond, for fees and disbursements as an attorney, or on an agreement to pay a certain sum to the plaintiff (not by way of penalty), or on a judgment recovered, the defendant may be held to bail of course, on a concise affidavit adapted to the cause of action.

In debt, *assumpsit*, *trover*, and covenant for payment of money, may hold defendant to bail of course. In debt, &c. bail of course. Barnes 79. *Le Writ against Tolcher.*

Bail was allowed, on an agreement in writing, to deliver goods or forfeit 100*l.* in an action for the penalty. Barnes 6. *Ketelly v. Woodcock.* Vide Douglas 449. Barnes 109. Sid. 63. Salk. 100.

If the action be in covenant where no money is covenanted to be paid to the plaintiff; Barnes 108. *Reynoldson v. Blady*; trespass, assault, battery, detinue,
Where no bail.

que, special action on the case, conspiracy, false imprisonment, slander, (except in slander of title,) cannot hold the defendant to bail, unless there is an order from the court or a judge; ibid. R. M. 1654. s. 12. nor in an action for a malicious prosecution. Barnes 76. Russell v. Gately.

Where damages are reduced to a certainty, as by a covenant to pay, &c. plaintiff is entitled to bail.

The court laid down this rule, that where damages can be reduced to a *certainty*, as in *covenant for payment of money*, or where a tenant covenants with his landlord to pay a *certain sum for every acre of land he plows up*, or the like, the plaintiff is entitled to bail, otherwise not, especially without a judge's order previous. It is not reasonable that defendant should be held to bail for such damages as plaintiff fancies he has sustained, and is pleased to swear to. *Barnes 108. Reynoldson v. Blady.*

Bail on a judgment in an inferior court.

In an action on a judgment of an *inferior court*, though bail was given in the original action below, defendant may be held to *special bail*, because no bail has been given in the superior court before. *Davis v. Leckie, Barnes 94.* Or if a *superfedeas* be gained by surprise, defendant may be held to bail. *Ibid. 62.*

Defendant may be held to bail in debt on the judgment.

In debt on the judgment, the defendant may be held to bail, (*if no bail given in the original action*), notwithstanding a writ of error be brought on the original action, and bail be given on the writ of error. *Kendal v. Carey. 2 Black. Rep. 768. Praes. Reg. 57. Weyman v. Weyman.*

May hold to bail in this court for the costs, if 10l.

In an action on the judgment upon a *non suit*, the defendant in that action may hold the plaintiff to bail for the costs, if they amount to ten pounds, or upwards; *for costs recovered on a groundless prosecution are as fair a debt, as for any other consideration. Nightingale v. Nightingale. 2 Black. Rep. 1274.*

If heir, &c. promises.

If an heir, executor, or administrator, personally promises and undertakes in writing to pay any debt or legacy, such promise will be binding, and he himself rendered liable to be arrested. *1 T. R. K. B. 716.* So if an executor or administrator has been guilty of a *devastavit* or wasting of the

By a *devastavit*.

the deceased's goods; in an action suggesting such *devastavit* he may be arrested. *Salk* 98. 2 *Lev.* 145. *Sid.* 63. But then it should be by an actual *devastavit* returned by the sheriff. *Carth.* 264.

In an action for *double rent*, upon holding over, upon the 4 *Geo. 2. c. 28.* plaintiff may require special bail. Double rent.

The court of King's Bench never permitted the defendant to be held to bail in an action on the judgment where the original debt was under 10*l.*; though, with the costs it made it more than that sum. 1 *Wils.* 120. 4 *Burr.* 2117. 5 *Burr.* 2660. But now it is settled, and you may hold to bail in an action on the judgment where the original cause of action was under 10*l.*: so that the debt, with the costs, amount to that sum or more. 4 *T. Rep.* 570.

The original debt was under *ten pounds*. Plaintiff recovered, and brought debt on the judgment, which was 14*l.* 10*s.* and held defendant to bail; whereupon he moved for a common appearance. *Sed per Cur.* The debt which we are to consider is the sum recovered by the judgment, and that defendant must be held to bail. *Nichols v. Wilder, Barnes* 432.

If the damages recovered with the costs amount to 10*l.* or upwards, the defendant may be held to bail.

Formerly the *servants of peers*, who were necessarily and properly employed about their estates and persons, were privileged from arrests. 1 *Wils.* 278. But by *Stat. 10 Geo. 3. c. 50. s. 10.* this privilege, together with all others which derogated from the common law in matters of civil right, save only as to the freedom of the members persons, was abolished. 1 *Black. Com.* 165.

Servants of peers, &c.

In what actions defendant cannot be held to bail.

But when the damages are *uncertain*, as in covenant where no money is covenanted to be paid, trespass, assault, battery, conspiracy, assault and false imprisonment.

K

imprison-

imprisonment, slander, (except in slander of title,) actions against bail on the bail bonds, penal statutes, (unless expressly enacted,) malicious prosecution, action for *crim. con.* on bond for performance of covenants, debt on recognizance of bail, or on replevin bond; the defendant cannot be held to bail of course.

In actions of assault, imprisonment, *scand. magn.* and other personal wrongs, in which it is apparent the damages will exceed 10*l.* the court, or any judge, on an affidavit of the circumstances, will give leave to the plaintiff to sue out a writ to hold defendant to special bail: but in these cases, the defendant must be stated, that he is going to quit the kingdom. Vide *Sid.* 307. *Ray.* 75. *Lev.* 39. 1 *Salk.* 99. See title *Common Appearance*.

If defendant was arrested *in the original action*, he is not to be held to bail in an action on the judgment. 2 *Black. Rep.* 768. *Kendal v. Carey*.

In an action on a recovery in a foreign court, there shall be a common appearance only. *Barnes* 70.

In an action on penal statutes, the defendant, generally speaking, is not to be held to special bail, because the penalty is in the nature of a fine or amercement, set on the party for an offence committed. *Barnes* 80. So in *qui tam* actions, unless the statute authorises the arrest.

What

What Persons are not to be held to Bail in Civil Cases.

PEERS of the realm, peeresses by birth. 1 *Inst.* 131. 2 *Inst.* 50. 4 *Bacon's Abr.* 228.; or marriage; peers of *Scotland*, 2 *Str.* 290; members of parliament, 10 *Geo.* 3. c. 50; for forty days after every prorogation; and for forty days before the next appointed meeting, 1 *Black. Com.* 165; members of convocation actually attending thereon, 8 *H.* 6. c. 1.; bishops, ambassadors, or the domestic servant of an ambassador, really and *bona fide* in that capacity, *Stat.* 7 *Ann.* c. 12. 3 *Wils.* 33.; the king's servants, 1 *Ray.* 152. 8 *Mod.* 12.; marshal, warden of the *Fleet*, 1 *Vent.* 65.; clerks, attornies, and all other persons attending the courts of justice, 4 *Inst.* 71. 2 *Inst.* 551. 12 *Mod.* 163.; clergyman performing divine service, and not merely staying in the church with a fraudulent design, 30 *Ed.* 3. c. 5. 1 *R.* 2. c. 16.; suitors, *Bro. Privil.* 57.; witnesses subpœnaed, and other persons necessarily attending any court of record upon business, *Sir T. Raym.* 101. 1 *Vent.* 11. *Rules in Chan.* 217.; witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, 1 *Atk.* 54.; heirs, executors, or administrators, *R. M.* 1654.; because the demand is not on the person, but on the assets of the deceased; a bankrupt for forty-two days, unless before in prison, 5 *Geo.* 2. c. 30.; sailor or volunteer soldier (unless the debt is twenty pounds), 1 *Geo.* 2. c. 14. s. 15. 33 *Geo.* 3. c. 9. s. 65.; an attorney attending on a summons, *Barnes* 378; also the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey, or the defence of their suit, 2 *Roll. Abr.* 273.; but the privilege the court allows their officers is restrained to those suits only which they bring in their own

Persons not held to bail.

right, or are brought against them in their own right; for, if they sue or be sued as *executors* or *administrators*, they then represent common persons, and are not entitled to privilege. *Hob.* 177. *Dyer*, 24. *pl.* 150. 2 *Sid.* 157. *Latch.* 199. *Godb.* 10.

But this privilege does not extend to *Irish*, or other *foreign peers*, 2 *Inst.* 48. 3 *Inst.* 70.; or to *peeresses* by marriage, if they afterwards intermarry with commoners. *Co. Lit.* 16. 2 *Inst.* 50. 7 *Co.* 15, 16.

Corporations.

Members of corporations aggregate, and hundredors not being liable to a *capias*, cannot be arrested in their corporate capacity, or on the statutes of hue and cry. *Bro.* title *Corp.* 43. 3 *Keb.* 126, 7.

When privilege destroyed,

Also if a privileged person brings a joint action, this destroys his privilege; because those with whom he joins are not officers of the court, nor entitled to the attachment which the court grants to its own officers. 2 *Roll. Abr.* 274.

A party who has attended his cause all day in court, and in the evening retires with his attorney and witnesses, at a tavern in *Palace-yard*, is privileged from arrests, *causa redeundi*. 2 *Black Rep.* 1113. *Lightfoot v. Cameron*; but a defendant, illegally in custody at the suit of one plaintiff, is not privileged from arrests at the suit of another, unless there be some collusion.

The defendant having been arrested in returning from attendance on the court to justify his bail, was ordered to be discharged. *Johannet v. Lloyd, Barnes* 27.

All persons who have relation to a cause which calls for their attendance in court, and who attend, are privileged from arrest.

Davis was arrested as he was returning from *Westminster-Hall*, where he had been to justify as bail for defendant, but was rejected. Rule why he should not be discharged. He was by order of the court brought up again to justify, and again rejected. Court ordered him to be remanded, and laid down this rule: *That all persons who had relation to a suit which called for their attendance, whether they were compelled by process or not, (in which number bail were included) were entitled to privilege*

privilege from arrest, *eundo et redeundo*, provided they came bona fide. *Meekings v. Smith*, 1 H. Black. Rep. 636. Mr. J. Gould said, he recollected the instance of a Mr. *Hippesley*, a barrister, who was discharged from an arrest on the circuit by Mr. J. Birch at Salisbury; and Mr. J. Heath said, he remembered a similar thing being done by Baron Buryland. Vide 11 Ed. 4. 3. in point as to bail.

A witness subpoenaed on an arbitration pursuant to a rule of court was arrested, and discharged on common appearance by Lord Loughborough.

A bankrupt is free from arrest in going and coming to surrender to the commissioners; and from actual surrender for forty-two days, or such further time as shall be allowed to finish his examination (provided he is not in custody at the time of surrender); and, if he be arrested for debt, or on any escape warrant, coming to surrender, or after his surrender, within the time before mentioned, then, on producing the summons, or notice, under the hands of the commissioners or assignees, and giving the officer a copy thereof, he shall be discharged; and if detained, such bankrupt shall have for his own use five pounds for every day he detains him. Stat. 5 Geo. 2. c. 30. s. 5.

A bankrupt free from arrest for 42 days.

The bankrupt cannot surrender to the commissioners on the opening of the commission, so as to protect himself, but may at the first sitting after, and from that time, he is protected.

In what cases defendant may be held to bail a second time.

The general rule is, when defendant has once been arrested, he cannot be arrested again for the same cause of action, *nemo debet bis vexari pro eadem causa*. 2 Str. 1209.

The plaintiff brought a former action, held defendant to bail for 70*l.* declared against him in case on a special agreement in writing under hand and seal not stamped; and the cause being at issue, the

A defendant was held to bail a second time for the same cause of action,

after discontinued by reason of a mistake.

attorney found out the mistake in declaring in an action on the case, the writing being made and executed in Ireland, where no stamps are necessary, was a good deed, and the plaintiff ought to have declared in *covenant*, therefore he discontinued that action upon the payment of costs; and brought this second writ for the same cause of action, and arrested defendant a second time. Motion to discharge defendant on a common appearance. *Curia*. This seems to have been a mere mistake, and not done with any intent to oppress or harass defendant; if any such intent had appeared, the court would certainly have discharged defendant on a common appearance; but it would be too much to say the plaintiff in this case should lose his bail by a mere slip of his attorney. *Rule discharged. Bates v. Barry, 2 Wils. 381.*

So on a nonsuit,

So if plaintiff be nonsuited in debt on bond, he may bring a new action, and hold the defendant to bail. *Barnes 73. Harris v. Roberts.*

For other cases, *vide my 5th edit. K. B. 98.*

Affidavits.

AFFIDAVIT signifies in law, an oath in writing; and to make *affidavit* of a thing, is to testify it upon oath. An *affidavit*, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath; and the true place of *habitation*, and true *addition* of every person who shall make an affidavit, is to be inserted therein. 1 Lill. Abr. 44. 46. *Affidavits* What it is to ought to set forth *matter of fact* only, which the contain. party intends to prove by his affidavit, not to declare the merits of the cause, of which the court is to judge.

An affidavit must set forth the matter *positively*, Must be positive. and all *material circumstances* attending it, that the Burr. 655. court may judge whether the deponent's conclusion 1 T. R. 83. be just or not. 1 New. Abr. 66. For whenever an affidavit is only by way of reference, it is bad. Bar. 100.

The affidavit must be *filed* before or at the time To be filed. of *suing out the writ*, or the court will discharge the party from the arrest, on filing a common appearance, although an affidavit be produced and proved to have been actually made and sworn before the writ was sued out. 2 Wils. 225. *Reekes v. Groneman*.

If the plaintiff joins *debt and case* together in one *affidavit*, the court will discharge defendant, be- Cannot join debt and case in one cause it is a fraud on the stamp duty. stamp.

So where several defendants are joined, and the cause of action is several, there must be separate stamps for the affidavit. Barnes 70. *Bett v. Goodman*. Nor against several defendants, where the action is several.

There must be a positive oath upon which per- Affidavit defective. jury can be assigned; therefore the court hold, that where an affidavit of debt was made, that defendant "in indebted, &c." instead of "is indebted," was held

held to be defective. 2 *Wils.* 226. *Reekes v. Groneman.*

Made by one convicted of felony not sufficient.

And an affidavit made by one convicted of felony, or a pickpocket returned from transportation, is not sufficient to hold to bail. *Barnes* 79. *Nicholls v. Dall, bunty.* But in a later case, an affidavit made by a person convicted of perjury was deemed good; for it was said, that although plaintiff cannot be a witness, yet he must not be stripped of his legal remedy to recover his just debts. *Horsey v. Somers.* *Barnes* 116. *Vide Davis v. Carter.* *Salk* 461.

Affidavit held sufficient, though not sworn positive by two justices against one.

An affidavit to hold to bail was, that the defendant, on the 10th of *October* 1767, entered into a bond for 5000*l.* with *Thomas Rice Stephen*, to the plaintiff, conditioned for payment of rent to *Thomas Rice Stephen*, for certain estates in *Ireland*, to the plaintiff his lessor; and that 2300*l.* was now due to the plaintiff, on account of the rent of said *Thomas Rice Stephen*; this was held sufficient by Mr. Justice *Gould* and *Nares*; but *Blackstone* Justice said, "that the affidavit ought to be positive." 2 *Black. Rep.* 740. *Long v. Lynch.* 3 *Wils.* 154. *S. C.*

Bonds were given conditioned for the payment of bills of exchange drawn in *England* on *A.* in the *East Indies*, in case such bills should be returned to *England* protested for non-payment. The affidavit to hold the obligor to bail, after stating, that he was indebted to the deponent the obligee in a certain sum, stated also the conditions of the bonds, and that the said bills were not paid to his knowledge or belief in *India*, or elsewhere, but that they were protested for non-acceptance in *India*, and were still unpaid Court. The affidavit is sufficiently positive as far as it states the knowledge or belief of the deponent that the bills were unpaid. But here the conditions of the bonds being set out, it appears that the affidavit introduces another term into them, namely, that of the bills being returned protested for non-acceptance, which is material, and renders the affidavit bad. But the plaintiffs may be permitted to

file a supplemental affidavit, which they refused.
Rule for common appearance absolute. Hodgson v. Campbell. 1 H. Black. Rep. 248.

Supplemental Affidavit.

When once the plaintiff has sworn to his debt in the *K. B. 1 T. R. 717. Dou. 467.* the court will never receive any affidavit whatever, either to explain or contradict the plaintiff's oath. *1 Wilf. 335. Str. 1157.* But this court admits of a *supplemental affidavit* to be made of the debt; for where a debt was sworn to by a third person, that the defendant was indebted, as appears by the stated account, and held insufficient; on shewing cause against a common appearance, the defect was supplied by a subsequent affidavit of defendant's acknowledging the stated account; the rule was discharged. *Swarbuck v. Wheeler. Barnes 100.*

Where the first affidavit is defective, yet it may be supplied in this court by another, on shewing cause against a common appearance.

C. J. I do not find that this court has ever gone so far as to admit a supplemental affidavit, where the first amounted to *no oath at all*, but has only supplied small defects in affidavits which have been not quite full enough. *Reeks v. Groneham. 2 Wilf. 224. Vide title Com. App.*

No supplemental affidavit, if first does not amount to an oath.

An affidavit that defendant was indebted to plaintiff in 500*l.* and upwards, which was held bad for uncertainty, court refused a supplementary affidavit. *Cooke v. Dobree. 1 H. Black. Rep. 10* And court said, that they could not on motion try the merits of the cause.

This court admits of supplemental and even *contradictory* affidavits; for they hold, that notwithstanding the plaintiff makes a positive affidavit of the debt, yet the matter of bail is examinable by the court. *Barn. 76. Russell v. Gateby, ib. 61. 72. Shaw v. Hawkins, ib. 87.*

Where an executor at first only swore to the debt as appeared by the accounts of the deceased, a subsequent affidavit, that he believed the debt to be due, was on shewing cause produced, and the rule for

Executor's affidavit supplied.

for a common appearance discharged. *Roche, extor. v. Carey.* 2 *Black. Rep.* 850.

Where made by a third person, must be positive.

Where the affidavit is made by a *third person*, it must be *positive*, unless in the case of an executor, &c. where belief is sufficient. *Manning v. Williams. Barnes* 87. 1 *Wilsf.* 339.

Must shew how the debt arose, and supplemental affidavit refused.

Affidavit that defendant was indebted to plaintiff in 500*l.* and upwards. Motion to discharge defendant, and to deliver up the bail-bond on entering a common appearance, for it does not appear how the debt arose. A supplemental affidavit was offered, but refused. Rule absolute. *Cooke v. Dobree.* 1 *H. Blackf. Rep.* 10.

Judges may empower commissioners to take affidavits.

By *Stat. 29 Car. 2. c. 5. s. 1.* The judges, &c. of the courts at *Westminster*, by commission, may empower persons in the several counties of *England* to take affidavits concerning matters depending in their several courts.

What affidavits may be sworn before a commissioner who is an attorney in the cause.

By rule *E. 13 Geo. 2.* "It is ordered, that from and after the 5th of *May*, in this present term, all such affidavits to hold the defendant to bail, or of the service of process where only a common appearance is required, may be sworn before the plaintiff's attorney being a commissioner, and may be made use of for the purpose aforesaid."

The person taking the same to have but 12*d.*

By *sect. 3.* of the same statute, the sum of 12*d.* and no more, besides the duty, is to be taken by such commissioner.

The affidavit may be sworn before the Filazer who issues the writ, or his deputy, and must be ingrossed on a treble sixpenny stamp paper.

It may be made by the *plaintiff* himself, or his *wife* or *servant*, or any *third person* in his absence, who *knows* of the debt being contracted, and can swear that it is *still due.* 1 *Wilsf.* 339.

If the plaintiff, being in *Scotland*, wants to hold defendant to bail in *England*, he may go before a magistrate in *Scotland*, competent to administer an oath, and make affidavit in the presence of another person who is shortly coming to *London*; which person,

person, upon his arrival in *London*, must also make affidavit that the former affidavit of the debt was made by the plaintiff; that the hand-writing there-to is his own hand-writing; that the said affidavit was made and taken before a magistrate who this deponent believes had competent authority to administer an oath; and that the hand-writing subscribing said affidavit, is the hand-writing of such magistrate; on which several affidavits a judge makes an order to hold to bail.

In the Common Pleas.

John Doe, of *Milk-street, Cheap-side, London*, taylor, maketh oath and faith, That *Richard Roe* is justly indebted unto this deponent in 20*l.* for the work and labour of this deponent, done and performed for the said *Richard Roe*, and for materials found.

For work done and materials found.

Every tradesman's bill for work done may be included in this affidavit.

John Doe, of *Milk-street, Cheap-side, London*, ware-houfeman, maketh oath and faith, That *Richard Roe* is justly indebted unto this deponent in 10*l.* and upwards, for goods sold and delivered.

For goods sold and delivered.

John Doe, of, &c. maketh oath, and faith, That *Richard Roe* is justly indebted unto this deponent in 100*l.* for money lent and advanced at his request.

For money lent.

For money by this deponent laid out, expended, and paid for the said *Richard Roe*, at his request.

For money laid out.

For money by the said *Richard Roe*, had and received to and for the use of this deponent.

For money had and received.

Indebted unto this deponent in 100*l.* on an account stated between this deponent and the said *Richard Roe*.

Upon an account stated.

For the work and labor of this deponent by him done for the said *Richard Roe*, and for materials found therein, and for divers goods by this deponent sold and delivered to the said *Richard Roe*, and also for money by this deponent laid out, expended, and paid, for the said *Richard Roe*, and for money lent and advanced by this deponent to the said *Richard Roe*, at his request, and also for money by the

For work done, and materials found, goods sold and delivered, money laid out, lent, and money had and received.

the said *Richard Roe* had and received to the use of this deponent.

For goods sold and delivered by partners.

John Denn, of, &c. woollen draper, maketh oath and faith, That *Richard Fenn* is justly indebted to this deponent, and his partner, *Richard Roe*, in 100*l.* for goods sold and delivered at his request.

The plaintiff's servant, if he knows of the debt being contracted, may (in the absence of the master) make affidavit of the debt being due, which will hold defendant to bail; then the affidavit will run thus:

For goods sold and delivered by a servant.

Joseph Lamb, servant to *Richard Fenn*, of *Newgate-street*, *London*. leatherfeller, maketh oath and faith, That *John Denn* is justly indebted to the said *Richard Fenn* in 400*l.* for goods sold and delivered to the said *John Denn*.

If the work be done by a carpenter, coach-maker, or any other trade, wherein servants and carriages are employed, the affidavit may be thus (though in point of law all is supposed to be done by the master, and may be so laid in the declaration):

For work done by the plain iff and his servants, &c.

For the work and labor of this deponent, done and performed by himself and his servants, for the said *John Denn*, with his horses, carts, and other carriages, at his request.

For the hire of horses.

For the hire of divers horses, mares, and geldings, of this deponent let to the said *John Denn*, and at his request.

For work done as a surgeon, and for medicines.

For the work and labor of this deponent as a surgeon, by him done and performed, in and about the healing and curing of the said *John Denn* of divers wounds, and also for divers medicines, potions, and plaisters, by this deponent found and provided for the said *John Denn*, and at his request.

For medicines found as an apothecary.

For divers medicines and other things, found and provided, administered and applied, to the said *John Denn*, by this deponent as an apothecary, and also to his family, at his request.

For

For feeding and depasturing of divers cattle of the said *John Denn*, at his request, for the space of six weeks, now elapsed. For depasturing of cattle.

For the use and occupation of a certain messuage, and divers acres of land, with the appurtenances, situate in the parish of *High Wycomb*, in the county of *Bucks*, for one year, now elapsed. For the use and occupation of a house and land.

For the use and occupation of a certain messuage, with the appurtenances, situate in *Frith-street, S. ho.*, in the county of *Middlesex*, held by the said *John Denn* of this deponent, for the space of one year, now elapsed. The like of a messuage.

For the use and occupation of certain rooms and apartments, in a certain messuage of this deponent, situate in *Fleet-street, London*, held and enjoyed by the said *John*, for the space of half a year now elapsed. For part of a messuage.

For certain arrears of rent, due and owing from the said *John Denn* to this deponent, for the use and occupation of a certain messuage or tenement, with the appurtenances, situate and being in the parish of *Saint Bride's, Fleet-street, London*, demised by this deponent, by indenture of lease, to the said *John Denn*. For arrears of rent due on a lease.

For a gelding sold and delivered by this deponent to the said *John Denn*, at his request. For a gelding sold.

For meat, drink, washing, lodging, and other necessities, by this deponent found and provided for the said *John Denn*, and his family, at his request. For meat, drink, washing, &c.

Notes of Hand.

John Denn, of *Burford*, in the county of *Oxford*, farmer, maketh oath and faith, That *Richard Fenn* is justly and truly indebted unto this deponent in the sum of fifty pounds, as the drawer of a promissory note, payable to this deponent or order, at a certain day now past (or on demand). Drawee against the drawer, on a note.

Upon a promissory note of hand, drawn by the said *Richard Fenn*, payable to one *A. B.* or order, and by him indorsed to this deponent, payable at a day now past. Indorsee against drawer.

Affidavits.

Indorsee against
the indorser.

Is justly indebted unto this deponent in fifty pounds, as indorsee of a promissory note of hand, indorsed to this deponent, and payable at a day now past.

On a note, where
part has been
paid, drawee
against the
drawer.

Is justly indebted unto this deponent in fifty pounds, upon a promissory note drawn by the said *Richard Fenn*, payable to this deponent, or order, for one hundred pounds, at a day now past.

Quaker's affirm-
ation.

A. B. of, &c. (being one of the people called *Quakers*) solemnly affirms, That *C. D.* is justly indebted to this deponent, in the sum of twenty pounds, upon a promissory note of hand, drawn by the said *C. D.* payable to this affirmant, or order, at a day now past.

Bills of Exchange.

Drawee against
acceptor on a bill
of exchange.

A. B. of, &c. grocer, maketh oath and faith, That *C. D.* is indebted to this deponent in seventy pounds, as acceptor of a bill of exchange, payable to this deponent or order, at a day now past.

Drawee against
drawer.

That *C. D.* is justly indebted to this deponent in 100*l.* as the drawer of a bill of exchange, payable to this deponent, or order, at a day now past.

Indorser against
the drawer.

That *C. D.* is justly indebted to this deponent in 70*l.* on a bill of exchange, drawn by the said *C. D.* on *J. K.* payable to his own order, and by the said *C. D.* indorsed to this deponent, and payable at a day now past.

Indorsee against
Indorser.

That *J. K.* is justly indebted to this deponent in 100*l.* on a bill of exchange, indorsed by the said *C. D.* to this deponent, payable at a day now past.

Trover.

Upon a proper affidavit the writ may be marked for bail in trover, without the order of the court, or a judge at his chamber; for it is more of an action of property than a tort. 6 *Mod.* 14. 1 *Wils.* 23. *Str.* 1192.

In trover for
goods,

A. B. of, &c. maketh oath and faith, That the defendant hath possessed himself of divers goods and chattels

chattels belonging to this deponent, of the value of 100*l.* and hath refused to deliver them up, and hath converted them to his own use.

That *C. D.* hath in his possession, a certain promissory note of hand of this deponent's, bearing date the 5th day of *June* 1789, whereby one *A. B.* six weeks after the date thereof, promised to pay to this deponent, or order, 40*l.* for value received; and which said promissory note the said defendant hath refused to deliver up, and hath converted it to his own use. Trove for a promissory note.

That *C. D.* hath in his possession, a certain bond or obligation of this deponent's, bearing date the 5th day of *January* 1783, entered into by one *J. K.* to this deponent, in the penal sum of 400*l.* conditioned for the payment of 200*l.* as therein mentioned; and which said bond the defendant hath refused to deliver up, and hath converted the same to his own use. The like for a bond.

That *C. D.* hath in his possession, divers deeds and writings of this deponent, of the value of 400*l.* and which deeds and writings the said defendant hath refused to deliver up, and hath converted them to his own use. The like for deeds generally.

Affidavit stating that defendant was indebted to the plaintiff *in trover* is bad; court said, that a word so technical as *trover* ought not to be used. Rule for entering a common appearance made absolute. *Hubbard v. Paches.* 1 *H. Black. Rep.* 218. Affidavit stating defendant indebted in trover bad.

That defendants have possessed themselves of divers goods belonging to the plaintiff, of the value of 20*l.* and have refused to deliver them up; and that they, or some of them, have converted and disposed of them to their own use. This affidavit was held sufficient in *K. B. Cowp. Rep.* 529. Another in trover.

That *C. D.* holds and unjustly detains from this deponent a certain indenture of lease, bearing date the 4th day of *February* 1783, made between *C. D.* of, &c. of the one part, and *A. B.* of, &c. of the other part, and which said indenture is of the value In detinue,

Affidavits.

value of twenty pounds and upwards to this deponent.

Bond.

On a bond.

J. K. of, &c. hofier, maketh oath and faith, That *C. D.* is juſtly indebted unto this deponent in 100*l.* and upwards, from principal and intereſt due on a bond, bearing date the 4th day of *May* laſt paſt, entered into by the ſaid defendant to this deponent, in the penal ſum of 200*l.* conditioned for the payment of 100*l.* and lawful intereſt for the ſame.

On an assignment of a bond, made by the assignee.

A. B. of, &c. mercer, and *I. D.* of, &c. gentleman, ſeverally maketh oath and ſay : And firſt this deponent, *A. B.* for himſelf ſaith, That *C. D.* did, by his bond, bearing date the 3d of *February* laſt paſt, become bound unto this deponent in the penal ſum of 200*l.* conditioned for the payment of 100*l.* and lawful intereſt, on a certain day now paſt. And this deponent further ſaith, That he did, by indenture, bearing date the day of laſt paſt, assign, and ſet over the ſaid bond unto the other deponent, *I. D.* and all monies due and owing thereon, for a valuable conſideration then paid by him the ſaid *I. D.* to this deponent. And theſe deponents *A. B.* and *I. D.* for themſelves, ſeverally ſay, That they have not, nor hath either of them, received any part of the ſaid 100*l.* ſo due on the ſaid bond, or the intereſt thereof, either before or ſince the ſaid assignment. And this deponent *I. D.* for himſelf further ſaith, That the ſaid *C. D.* is now juſtly indebted unto this deponent, as assignee as aforeſaid, in the ſum of 102*l.* 10*s.* for the principle and intereſt due upon the ſaid bond.

I find a caſe cited in 1 *Wils.* 231. where an *assignee only* of a bond ſwore, that the obligor was indebted in 90*l.* for principal and intereſt upon the bond, as he believed, was held ſufficient : and the court ſaid, As the assignee had the bond in his own cuſtody,

custody, it was of itself some evidence of the debt; and the presumption must be, that it was not paid, as the bond was not cancelled or given up to the obligor. *Loveland v. Bassett*, cited in case of *Van Morsell v. Julian*. Vide for affidavit of assignee only my *K. B.* 5 edit. 110. If the obligee will join in the bond, it will be the best and safest way.

A. B. of, &c. mercer, maketh oath and saith, That *C. D.* is justly and truly indebted unto this deponent in thirty pounds, on and by virtue of a judgment recovered by this deponent, in this honourable court, against the said defendant as of *Easter* term last past; and also in the further sum of five pounds for his costs taxed therein. Affidavit for money due on a judgment.

A. B. of, &c. grocer, maketh oath and saith, That *C. D.* is indebted unto this deponent in 50*l.* for half a year's arrear of a certain annuity due to this deponent, upon and by virtue of a bond, bearing date the 3d day of *June* 1789, entered into by the said defendant to this deponent, in the penal sum of 600*l.* conditioned for the payment of the sum of 100*l.* a year, for the life of the said defendant, to this deponent. On an annuity bond.

A. B. of, &c. tallow-chandler, maketh oath and saith, That *C. D.* is indebted unto this deponent and *J. M.* as assignees of the estate and effects of *J. K.* a bankrupt, in twenty pounds, as appears by an account under the bankrupt's hand, and delivered to this deponent, and which sum this deponent verily believes to be due from the said defendant, to the estate of the said bankrupt. By the assignee of a bankrupt.

The *K. B.* have determined if there be three assignees, one of them may make an affidavit, and hold to bail. 4 *Term Rep.* 176. *Swaine et al. v. Gramond*. Barnes 91.

J. K. of, &c. grocer, executor of the last will and testament of *A. B.* deceased, maketh oath and saith, That the above defendant is justly indebted unto this deponent, as executor as aforesaid, in fifty pounds, for goods sold and delivered by the said *A. B.* in his life-time, as appears by the books of By an executor, for goods sold and delivered. 2 *Black. Rep.* 850.

Upon a note by
an executor.
Barnes 70.

the said *A. B.* and which sum is now due from the said defendant to the estate of the said *A. B.* as this deponent verily believes.

Upon a promissory note given by the defendant to the said *A. B.* in his life-time, as he believes, and as appears to this deponent by the note in his custody, and which said sum is now due to this deponent, as executor as aforesaid, as he verily believes.

Words of reference alone, such as *appears by the testator's, or the bankrupt's books*, and the like, are not sufficient, unless followed up by the *belief* of the party who makes the affidavit. *Str.* 1219. *Burr.* 1992. 1 *Term Rep.* 84. *Burr.* 2203.

How to proceed
to hold to bail
for an assault.

In order to hold a defendant to bail for an assault, an affidavit must be prepared, sworn to by the plaintiff and a witness who was present, and laid before a judge; which affidavit is ingrossed on a treble sixpenny stamp paper, and sworn before him; if he approves thereof, he will make an order thereon.

An affidavit to
hold to bail for
an assault.

P. C. of, &c. late mariner on board the merchant ship the *W.*; *B. R.* of, &c. commander, and *J. H.* of, &c. late mariner on board the said ship, severally make oath and say; and first this deponent *P. C.* for himself saith, That in or about the month of *June*, in the year of our Lord 1792, as this deponent was doing his duty on board the said ship, in hawling up the range cable, *J. D.* mate of the said ship, struck this deponent several violent blows on his head, and several parts of this deponent's body, with his clenched fist: and this deponent saith, That having threatened the said *J. D.* when he this deponent came to *London*, he would endeavour to get satisfaction of him for such ill treatment; from which said expression this deponent verily believes the said *J. D.* conceived great hatred and malice against this deponent, and often threatened this deponent, that he would have his life, if he should be hanged for it: and this deponent saith, That on the homeward passage from *Ja-*

maica, as this deponent was doing his duty, in hoisting out the boat belonging to the said ship, in order to tow the said ship, that she should not get foul of any other vessel, the wind being calm, as this deponent was lowering the said boat, the said *J. D.* hailed to this deponent to let go the said boat: and this deponent saith, That according to his said instructions, he let the boat go, but not so soon as the said *J. D.* thought it might be done; whereupon the said *J. D.* came to this deponent, and, with many opprobrious expressions and other ill usage, struck this deponent a violent blow on the right shoulder with a rope, called the gibb haulyards, about two inches and a half in circumference: and this deponent saith, That from the violence of the said blow the blood gushed from this deponent's shoulder: and this deponent saith, That the said *J. D.* struck this deponent several other violent blows, with the said rope, on his loins, shoulder, and other parts of his body, so that his shoulder and other parts of his body were bruised and swelled: and this deponent saith, That from the said ill treatment he remained ill about one month after, and that he still continues to feel pains occasioned by the said ill treatment, as aforesaid; and that he did not do or say any thing, or give any provocation whatsoever to the said *J. D.* to merit or deserve such ill treatment. And this deponent *J. H.* for himself saith, That he was present at the several times mentioned by the other deponent, and that he did see the said *P. C.* ill treated in manner and form as by him above deposed: and this deponent saith, That he did not see or hear the said *P. C.* say or do any thing, in this deponent's hearing, to deserve or merit such ill treatment: and this deponent *P. C.* for himself, further saith, That he has been informed, and which information this deponent believes to be true, that the said *J. D.* is a person in good circumstances, and well able to make satisfaction for the said ill treatment: and this deponent lastly

Affidavits:

saith, That he is informed that the said *J. D.* will soon depart this realm ; and unless he be held to bail, this deponent will be deprived of that satisfaction to which he thinks himself entitled by the laws of this country.

It seems that an order has been refused on the plaintiff's own affidavit by Mr. Justice *Gould*.

The COUNTIES of ENGLAND.

Bedfordshire	Lincolnshire
Berkshire	Middlesex
Buckinghamshire	Monmouthshire
Cambridgeshire	Norfolk
Cheshire, C. P.	Northamptonshire
Cornwall	Northumberland
Cumberland	Nottinghamshire
Derbyshire	Oxfordshire
Devonshire	Rutlandshire
Dorsetshire	Shropshire
Durham, C. P.	Somersetshire
Essex	Staffordshire
Gloucestershire	Suffolk
Hampshire	Surrey
Hertfordshire	Sussex
Herefordshire	Warwickshire
Huntingdonshire	Westmoreland
Kent	Wiltshire
Lancashire, C. P.	Worcestershire
Leicestershire	Yorkshire.

It appears that *Alfred the Great*, a Saxon King, was the first that divided *England* into *counties*, or *shires*.

They are subdivided into *Maritime* and *Inland*. There are 19 of the former ; *seven* whereof are situate on the *German Sea*, *six* on the *Channel*, *two* at the *Severn's Mouth*, and *four* upon the *Irish Sea*, or *St. George's Channel*: Those on the *German Sea* are, *Northumberland*, *Durham*, *Yorkshire*, *Lincolnshire*, *Norfolk*, *Suffolk*, and *Essex*.

Those

Those on the *Channel*, *Kent*, *Sussex*, *Hampshire*, *Dorsetshire*, *Devonshire*, and *Cornwall*.

Those at the *Severn's Mouth*, *Somersetshire*, and *Monmouthshire*.

Those in the *Irish Sea*, *Cheeshire*, *Lancashire*, *Cumberland*, and *Westmoreland*.

The *Inland Counties* are 21 in number.

Bedford	Northampton
Berks	Nottingham
Bucks	Oxford
Cambridge	Rutland
Derby	Shropshire
Gloucester	Stafford
Hertford	Surrey
Hereford	Warwick
Huntingdon	Wiltshire
Leicester	and
Middlesex	Worcestershire:

The counties of *Chester*, *Durham*, and *Lancaster*, are called *counties palatine*, and writs issued out of the superior courts of *Westminster*, are to be specially directed there.

The *Principality of Wales* is divided into two parts, namely, *North* and *South*.

<i>North Wales</i> contains,	<i>South Wales</i> contains,
Anglesea	Brecknockshire
Caernarvonshire	Cardiganshire
Denbighshire	Carmarthenshire
Flintshire	Glamorganshire
Merionethshire	Pembrokeshire
and	and
Montgomeryshire	Radnorshire.

The writ of *latitat* runs into *Wales*. *Perry v. Jones*. *Dougl. Rep.* 212. *Lloyd v. Jones*. *Ibid*.

Cinque Ports.

These are five havens that lie in the East part of *England*, towards *France*, thus called by way of eminence, on account of their superior importance; as having been thought by our kings to merit a particular regard for their preservation against invasions. Hence they have a particular policy, and are governed by a keeper, with the title of *lord warden of the cinque parts*; which office belongs to the *Constable of Dover*: and their representatives are called, *barons of the cinque ports*. The five ports are, *Hastings*, *Romney*, *Hythe*, *Dover*, and *Sandwich*; to which *Winchelsea* and *Rye* have been since added.

To *Hastings* belong *Seaford*, *Pevensey*, *Hedney*, *Winchelsea*, *Rye*, *Hamne*, *Wakebourn*, *Creneth*, and *Forth. lye*.

To *Romney* belongs, *Bromball*, *Lyde*, *Oswarstone*, *Dangemare*, and *Romenball*.

To *Hythe* belongs *Westmeath*.

To *Dover* belongs, *Folkston*, *Feversham*, and *Murge*.

To *Sandwich* belongs, *Fordiwic*, *Reculver*, *Serre*, and *Deal*.

The writ of *capias* runs there, and is directed to the *constable of the castle of Dover*, or to his deputy.

Process.

PROCESS is that by which a man is called into any temporal court, because it is the beginning or principal part thereof by which the rest is directed : or, if taken strictly, it is the proceeding after the original and before judgment. *Britton*, 138. *Crompton of Courts*, 133. 8 *Rep.* 157. Process to call persons into court, &c. must be in the name of the king ; and if it issue from the superior court, it ought to be under the *teste* of the chief justice, or of the senior judge of the court, if there be no chief justice ; and if it issues from any other court, it is to be under the *teste* of the first in commission. *Dalt. ch.* 132. *Finch.* 436. *Gro. Car.* 393.

By the 5 *Geo. 2. c. 27. s. 5.* it is enacted, That where the cause of action shall not amount to ten pounds or upwards in any superior court, or to forty shillings or upwards in any inferior court, no special writ or writs, nor any process specially therein expressing the cause or causes of action, shall be sued forth or issued from any such superior or inferior court respectively, in order to compel any person to appear in such court or courts ; and all proceedings and judgments, that shall be had on any such writ or process, shall be void : and every attorney, &c. suing forth or issuing out such writ or process, shall forfeit ten pounds to the persons aggrieved, who may recover the same by action of debt, &c.

No special writs shall issue in suits where the cause of action does not amount to 10l.

The name of the attorney shall be indorsed on the writ or process to be issued, *Stat. 2 Geo. 2. c. 23. s. 22.* ; as also on the warrant granted by the sheriff, on pain of 5*l.* But the not indorsing the name of the attorney on the warrant, shall not vitiate the same, provided the writ be regularly subscribed. 22 *Geo. 2. c. 13. s. 4.* *Barnes* 329. 412. *Lagget v. Watkins.*

on penalty of 10*l.*
Attorney's name must be indorsed on the writ.

Of commencing an action in this court by common capias.

In bailable actions the party should be cautious that his writ is in every respect regular; because if it be materially otherwise, as if a person be arrested on a *capias* where one term intervenes between the teste and return, the writ is void, and the party may maintain his action against the original plaintiff for false imprisonment; nor can he justify under such void process. 3 *Wils.* 344. *Parson v. Lloyd.*

The method of commencing the suit by common *capias*, if bailable.

The method of commencing an action in this court if the defendant is to be holden to *bail*, is as follows:

In a country cause the affidavit is sworn before a commissioner there.

Prepare an affidavit of the plaintiff's demand, ingross it on a treble sixpenny stamp paper, which is to be sworn before a *judge*, or the *filacer* of the county where the writ issues, or his deputy; then prepare a *præcipe* for the writ, which must be adapted according to the nature of the action, and a *capias* (which may be had at the stationers already printed, except the *ac-etiam*), and also a warrant or memorandum to prosecute the suit pursuant to the statute 25 *Geo.* 3. c. 80. on a 2s. 6d. stamp: take the *affidavit*, *præcipe*, *capias* and *warrant* to the proper *filacer*, who will sign same, pay 2s. 2d.; then go to the seal office, No. 3, Inner Temple Lane, and get same sealed, pay 7d. The warrant is obtained at the sheriff's office (if in *Middlesex*, in *Tock's Court*, *Cursitor Street*); if in *London*, in *Grocer's Alley* in the *Poultry*, pay 4d.; if in *Surry*, *Essex*, or *Kent*, pay 6d.; any other county, 2s. 6d.

The necessary precedents for the warrant or memorandum, writ and *præcipe*, will be as follow:

In the Court of Common Pleas.

Warrant to prosecute, 2s. 6d. stamp.

Middlesex, } *Richard Nix* is retained to prosecute
to wit. } by *Richard Fenn*, as his attorney,
against *John Denn*.

Richard Nix, plaintiff's attorney.

No. on the file.

If

If by an agent to the solicitor immediately retained, add, by G. H. his agent.

Entered or filed of record this day of
in the 33d year of king George III.

(Officer's Name.)

These latter words are wrote by the filacer.

None of the duties mentioned in the act are to be charged to the client ; if they are charged, then to be disallowed, or if paid, the attorney to refund, and pay costs. 25 Geo. 3. c. 80. s. 20. None of the duties to be charged, &c.

The agents are to be repaid the 2 s. 6d. stamp for the memorandum or warrant, by the solicitor employed in the suit. s. 25. Agents to be repaid the 2s. 6d.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To the Sheriff of Middlesex, greeting: We command you, that you take John Denn, late of Westminster, in your county, yeoman, and Richard Roe, late of the same place, yeoman, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at Westminster, on the Morrow of All Souls, to answer Richard Fenn, in a plea, wherefore, with force and arms, the close of the said Richard at Westminster they broke, and other wrongs to him did, to the great damage of the said Richard, and against our peace ; and also that the said John Denn may answer the said Richard Fenn, according to the custom of our court of Common Bench, in a certain plea of debt upon demand, for one hundred pounds ; and have you there this writ. Witness Sir James Eyre, Knight, at Westminster, the 19th day of June, in the 33d year of our reign. Capias in debt requiring bail.
Ac-etiam.
The penalty of the bond.

J. P. Attorney.
Inner Temple,
2d August 1793.

Indorse the attorney's name and } Oath for 50l.
sum sworn to on the back. } per affidavit filed.

Make

Præcipe for the
office.

Make a *præcipe* for the filacer thus, on plain paper.
Middlesex, } *Capias* for *Richard Fenn* against *John*
to wit, } *Denn*, late of *Westminster*, in the said
county, yeoman, trespass at *Westminster*, debt for
100*l.* returnable on the *Morrow of All Souls*.

Oath for 50*l.*

J. P. Attorney.
Inner Temple,
2d August 1793.

Return and
teste.

The writ of *capias* must be made on a general
return day. 1 *Barnes* 295. *Lloyd v. Beeston*.
And there must be fifteen days between the teste and
return. 2 *Wils.* 117. *Atkinson v. Taylor*. *Barn.*
409. *Williams v. Faulkener*. But it may be tested
before the cause of action accrued in every case (ex-
cept where the plaintiff proceeds to an outlawry);
and such teste must bear date in term, otherwise
void: if sued out in vacation, to be tested the last
day of the preceding term, *Barn.* 407., and must be
made returnable in term, otherwise void. *Vide*
Sir. 399. *Fortesc.* 363.

Filacer's name.

It is not necessary to add the filacer's name to a
capias. *Frost v. Eyles* and *Jacques*. 1 *H. Black.*
Rep. 120.

Capias in case.

George the Third, &c. To the sheriffs of *Lon-*
don, greeting. We command you that you take
Richard Fenn, late of *Westminster*, in your county,
yeoman, and *Richard Roe*, late of the same place,
yeoman, if they may be found in your bailiwick,
and them safely keep, so that you may have their
bodies before our justices at *Westminster*, on the
Morrow of All Souls, to answer *John Denn*, in a plea,
wherefore with force and arms the close of the said
John Denn, at *London*, they broke, and other wrongs
to him did, to the great damage of the said *John*
Denn, and against our peace; "and also that the
" said *Richard* may answer the said *John*, according
" to the custom of our court of Common Bench, in a
" certain plea of trespass on the case, upon promises to
" the damage of the said *John* of thirty pounds;" and
have

Ac-etiam.

have you there this writ. Witness Sir James Eyre, Knight, at Westminster, the 19th day of June, in the 33d year of our reign.

London. Capias for John Denn against Richard Fenn late of Westminster, in the said county, yeoman, trespass at Westminster. Case for 30l upon promises, returnable on the Morrow of All Souls. .

J. P. Attorney
Inner Temple,
2d August 1793.

Oath for 15l.

All the judges agreed, that several defendants for separate causes of action, cannot be joined in the same writ, or in the same affidavit. E. 32 Geo. 3. 4 Term Rep. K. B. 697.

This court cannot amend an original writ, because it issues out of the court of chancery; yet this court can amend all mesne process, and also an attachment of privilege: therefore they ordered a capias to be amended, there not being fifteen days between the teste and return. Carty v. Ashley. 3 Wils 454. 2 Black. Rep. 918.

Amendment of capias in the teste.

Cockell, Serjeant, moved to set aside the proceedings on a common capias for irregularity, because there were not fifteen days between the teste and return. Court said, the practice was to allow the teste to be amended, and therefore no rule. Bouchier v. Whittle. 1 H. Black. Rep. 291. contra 2 Wils. 117. Atkinson v. Taylor.

The want of 15 days between the teste and return of the capias, may be amended.

If the capias is sued into any other county, viz. Oxford, lay the trespass at Oxford, or any other town in the county.

And also that the said Richard Fenn may answer the said John, according to the custom of our court of Common Bench, in a certain plea of trespass and assault to the damage of the said John of 100l.

Ac-etiam for an assault.

N. B. You indorse the writ thus, " Bail by order of Mr. Justice Gould, for 20l.

And also that the said Richard may answer the said John, according to the custom of our court of Common

In covenant,

Common

In trover.

Common Bench, in a certain plea of breach of covenant, to the damage of the said *John* of 50 *l*.

And also that the said *Richard* may answer the said *John*, according to the custom of our court of Common Bench, in a plea for the converting and disposing of the goods and chattles of the said *John*, to the value of 50 *l*.

Detinue.

And also that the said *Richard* may answer the said *John*, according to the custom of our court of Common Bench, in a plea for the detaining of the goods and chattels of the said *John*, to the value of 50 *l*.

If two defendants jointly.

And also that the said *John* and *Richard* may answer the said *John Doe*, according to the custom of our court of Common Bench, in a certain plea of trespass on the case, to the damage of the said *John Doe* of 40 *l*.

As executor in case.

And also that the said *John* may answer the said *Richard*, as executor of the last will and testament of *Simon Vowel*, deceased, in a certain plea of trespass on the case upon promises, to the damage of the said *Richard*, executor as aforesaid, of 100 *l*.

As administrator on bond.

And also that the said *John* may answer the said *Richard*, as administrator of all and singular the goods, chattels, and credits of *John Vowel*, deceased, according to the custom of our court of Common Bench, in a certain plea of debt upon demand for 200 *l*.

As assignees.

And also that the said *John* may answer the said *Richard* and *James*, as assignees of the estate and effects of *James Doe*, a bankrupt, according to the custom of our court of Common Bench, in a certain plea of trespass on the case, to the damage of the said *Richard* and *James*, assignees as aforesaid, of fifty pounds, and have there, &c.

By *stat. 5 Geo. 2. c. 27.* it is enacted, "That in peculiar franchises and jurisdictions the proper officer shall execute the process; this means where it requires bail."

The printed *capias* is made to run in the plural number; therefore if there is no more than one defendant

defendant to be sued, add *John Doe*, or *Richard Roe*, being the usual names inserted for that purpose.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to the sheriffs of London, greeting: Capias against two defendants.

We command you, that you take *John Denn*, late of London, merchant, and *Richard Fenn*, late of the same place, merchant, if they shall be found in your bailiwick, and keep them safely, so that you may have their bodies before our justices at *Westminster*, on the *Morrow of All Souls*, to answer *A. B.* of a plea, wherefore with force and arms the close of the said *A. B.* at London, they broke, and other wrongs to him did, to the great damage of the said *A. B.* and against our peace; "and also that the said John and Richard, may answer the said *A. B.* according to the custom of our court of Common Bench, in a certain plea of trespass on the case, (or whatever the action is) on promises, to the damage of the said *A.* of sixty pounds;" and have you there this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of November, in the 33d year of our reign. Ac-etiam;

London. Capias for *A. B.* against *John Denn*, late of London, merchant, and *Richard Fenn*, late of the same place, merchant, trespass at London, case for sixty pounds, upon promises, returnable on the *Morrow of all Souls*. Præcipe.

Oath for 30l.

A. K. Attorney.
2d August 1793.

If the defendant cannot be taken on the *capias* before the return thereof, then you may have a *capias by continuance*, which is the same as the *capias* already printed; and do not add the words ("as before we have commanded you"); but the only difference is in the *præcipe* to the filacer thus, London, (H.) *Capias by continuance* for *John Doe* against *Richard Roe*, late of, &c. trespass at London, returnable on, &c. The filacer charges signing 10d. and Capias per continuance.

and seal 7d. N. B. Put the date of the *first writ* on the *præcipe*.

The filacer formerly used to make out these writs on receiving the *præcipe*; but as there is a great deal more business done now than formerly, the attornies make them out for expedition themselves.

The day of signing the writ is to be set down thereon.

And by several statutes, Every officer or clerk of this court, who shall sign any writ or process before judgment to arrest any person thereupon, shall, before the signing thereof, set down, upon such writ or process, *the day and year of his signing the same, which shall be entered upon the remembrance*, upon the forfeiture of ten pounds. 5 & 6 W. & M. c. 21. s. 3. 9 & 10 W. 3. c. 25. s. 42. 9 Geo. 2. c. 35. s. 32. *Pract. Reg. C. P.* 440. 441. *Barnes* 420.

If defendant lives in a liberty.

If the defendant lives in any liberty where the sheriff, to whom the writ is directed, cannot enter, to arrest the body, make out a *non omittas capias*, to empower him to enter into that liberty.

The return of *mandavi ballivo*, which was formerly necessary, is now presumed and dispensed with; and the *non omittas capias* may now be sued out in the first instance, without any previous writ or return. The writ runs now generally; formerly the particular liberty was mentioned.

Non omittas capias.

George the Third, &c. To the sheriff of Norfolk, greeting. We command you, that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and take *John Priest*, late of *Thetford* in your county, yeoman, and *Richard Roe*, late of the same place, yeoman, if they shall be found in your bailiwick, and keep them safely, so that you may have their bodies before our justices at *Westminster*, on the *Morrow of All Souls*, to answer *James Spratt*, in a plea, wherefore with force and arms the close of the said *James* at *Thetford* they broke, and other wrongs to him did, to the great damage of the said *James*, and against

A memorandum or warrant is necessary, if sued out in the first instance.

OUR

our peace; " and also that the said John may answer *Ac-etiam.*
 " the said James according to the custom of our court
 " of Common Bench, in a certain plea of trespass on
 " the case upon promises, to the damage of the said
 " James, of 100*l.*" and have you there this writ.
 Witness Sir James Eyre, Knight, at Westminster the
 19th day of June, in the 33d year of our reign.

Norfolk (H.) *Non omittas capias*, for James Spratt, *Præcipe.*
 against John Priest, late of Thetford, yeoman, tres-
 pass at Thetford, case for one hundred pounds,
 on promises, returnable on the Morrow of All
 Souls.

Oath for 50*l.*

J. K. Attorney.
 2d August 1793.

Pay filacer signing 8*s.* 6*d.*; seal 1*s.* 2*d.*

Formerly, if the defendant could not be found in the county where the *capias* issued, or that he did not live in the county where the plaintiff intended to lay his *venue*, in order to arrest him in another county, a writ of *testatum capias* issued, directed to that sheriff, wherein was recited the first writ, " and that it was testified, *testatum est*, that the defendant lurks and wanders in his bailiwick, wherefore he is commanded to take him as in the former *capias*." But the court, seeing the great inconvenience which the practisers were led into, by putting in bail in the county where the *testatum* issued, instead of the county where the *capias* issued, in Hilary term 1781, made a rule on the sheriffs to put upon their warrants from what county the *capias* issued. This not having the full effect intended, in Hilary term 1782, the following rule was made:

Until lately, if defendant did not live in the county where *venue* laid, a writ of *testatum* issued.

Whereas in actions where special bail may be required, in case the defendant resides in a different county from that where the cause of action arises, and where it ought to be laid, and may on the part of the defendant be compelled to be tried, but on the part of the plaintiff to entitle himself so to declare, it is necessary to sue a *capias* in the one county, and then a *testatum capias* into the other, and mistakes frequently happen

Plaintiff may declare in a different county than that in which the arrest was made, and no waiver of bail.

by

by putting in bail with the filacer of the county where the arrest is, instead of that in which the first *capias* issued, by means whereof great expence and delays are often occasioned; "It is therefore ordered by this court, where an arrest shall be by virtue of a *capias ad respondendum* in any county, and bail shall be put in thereupon, and the plaintiff shall think proper afterwards to declare in a different county, it shall not be deemed a waiver of bail: but the recognizance of the bail shall be as effectual for the benefit of the plaintiff, and he may proceed thereon against the bail, in the same manner as if the plaintiff had declared against the defendant in the same county in which the bail was put in.

Which rule has taken away the *testatum*.

Which rule without doubt has taken away the writ of *testatum capias*; so that now, if the defendant cannot be found in the county where the first *capias* issued, the plaintiff's attorney, on taking an office copy of the *affidavit*, marked by the filacer for the county where the first writ issued, may make out a *capias* (as before) into another county; pay 1s. for the copy of the *affidavit*; stamp and paper 1s. 7d.; signing *capias* with the new filacer 2s. 2d.; seal 7d.; without having any return of the first *capias*. N. B. The day the first writ issued, and the county should be marked on the *præcipe*.

Reason for having the *testatum*.

And the reason for having the *testatum* was, that the plaintiff lost his bail, if he declared in any other county than that in which the *capias* issued; so that if the defendant lived in any other county than that in which the plaintiff intended to try his cause, he was obliged to have a *testatum capias* to arrest him, and which he might issue in the first instance, though the suggestion of the *capias* having issued was but fiction; yet it being beneficial to all parties was readily acquiesced in, being one in many instances to illustrate that maxim of law, that *in fisione juris consistit æquitas*.

Capias now issues into county palatine.

If the defendant lives in a county palatine, and is to be held to bail, the writ may now be a *capias*, directed to the Chancellor of the county palatine of Lancaster;

Lancaster; to the Chamberlain of the county palatine of *Chester*; or to the Bishop of *Durham*; and not at *testatum capias* as formerly, but the debt must amount to 20*l.* Stat. 11 & 12 *W.* 3. c. 9. s. 2.

Directions to be observed in Writs directed to Chester, Lancaster, and Durham, being the Counties Palatine.

To the Chamberlain of our county palatine of *Chester*, *Chester*.
or to his deputy there, greeting, &c.

To the Chancellor of our county palatine of *Lancaster*, *Lancaster*.
or to his deputy there, greeting, &c.

To the Reverend Father in God, by permission Lord Bishop of *Durham*, or to his Chancellor there, greeting, &c.

George the Third, by the grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to the chamberlain of our county palatine of *Lancaster*, or to his deputy there, greeting: We command you, that by our writ under the seal of our said county palatine, to be duly made, and to be directed to the sheriff of the said county palatine, you command the said sheriff, that he take *John Knott*, late of, &c. yeoman, and *Richard Roe*, late of the same place, yeoman, if they be found in his bailiwick, and them safely keep, so that you may have their bodies before our justices at *Westminster*, on the *Morrow of All Souls*, to answer *Richard Fenn*, in a plea, wherefore with force and arms the close of the said *Richard Fenn*, at *Lancaster* they broke, and other wrongs to him did, to the great damage of the said *Richard Fenn*, and against our peace; "and also that the said *John* may answer " the said *Richard*, according to the custom of our " court of Common Bench, in a certain plea of trespass " on the case upon promises, to the damage of the " said *Richard Fenn* of fifty pounds;" and have there this writ. Witness Sir *James Eyre*, Knight,

Capias to the county palatine of *Lancaster*.

A memorandum or warrant on a 2*s.* 6*d.* stamp must be filed.

Ac. etiam.

M

at

at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

The like to
Chester and
Durham.

The like form will do for *Chester*; but for *Durham* say, *We command you, that under the seal of your bishoprick, to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded, that he take John Knott, late of, &c. as in the former.*

Præc. pe.

Co. Pal. of Lancaster, capias for Richard Fenn against John Knott, late of, &c. tresp. at Lancaster, and also for fifty pounds on promises, returnable on the Morrow of All Souls.

Oath for 25l.

T. P. Attorney.
2d August 1793.

Take it to the filacer, Mr. Bolton, to sign; pay 2s. 2d. seal 7d.

Cinque Ports.

If the defendant lives in any of the cinque ports, as *Hastings, Romney, Hythe, Dover, or Sandwich*, a *testatum* is not necessary. But the direction must be, *To the constable of our castle of Dover, or to his deputy there.*

Cap. to the
Cinque Ports.

A memorandum
or minute must
be filed on a
2s. 6d. stamp.

George the Third, by the grace of God of Great Britain, &c. to the constable of our castle of Dover, or to his deputy there, greeting: We command you, that you take John Denn, late of Dover, yeoman, and Richard Roe, late of the same place, yeoman, if they shall be found in your bailiwick, and them safely keep, so that you have their bodies before our justices at Westminster, on the Morrow of All Souls, to answer Richard Fenn, in a plea, wherefore with force and arms the close of the said Richard, at Maidstone, they broke, and other wrongs to him did, to the great damage of the said Richard, and against our peace; and also that the said John may answer the said Richard, according to the custom of our court of Common Bench, in a certain plea of trespass on the case, upon promises, to the damage of the said Richard of 100l. and have you there this writ. Witness Sir James Eyre, Knight,

Ac-etiam.

at

at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

Cinque Ports. *Capias* for *Richard Fenn* against *Præcipe*.
John Denn, late of *Dover*, yeoman, trespass at *Maidstone*, case for 100*l.* on promises, returnable on the *Morrow of All Souls*.

Oath for 50*l.*

T. P. Attorney.
2d August 1793.

The filacer signs this; pay him 2*s.* 2*d.* seal 7*d.*

CITIES and TOWNS having a SHERIFF
or SHERIFFS.

Cities of	} have two sheriffs.	Cities of	} one sheriff.
Bristol		Canterbury	
Coventry		Exeter	
Chester		Litchfield, and	
Gloucester		Worcester	} one sheriff.
Lincoln		Towns of	
London		Kingston upon Hull	
Norwich		Southampton	
and		Pool, and	
Town of		Newcastle upon Tyne	
Nottingham			

To the sheriffs of our
city of
Bristol
Chester
York
Gloucester
Lincoln

To the sheriffs of our
city of
Norwich
Canterbury
Exeter
Worcester.

How to direct
the writ.

To the sheriffs of our city of *Coventry*, and county of the same city.

To the sheriffs of our town and county of *Nottingham*.

To the sheriff of our town and county of *Kingston upon Hull*.

To the sheriff of our town and county of the town of *Southampton*.

To the sheriff of our city of *Litchfield*, and county of the same city.

To the sheriff of our town and county of the town of *Pool*.

To the sheriff of our town and county of *Newcastle upon Tyne*.

In other counties there can be no difficulty of directing the writ; as, To the sheriff of *Berkshire*, unless it be a writ of *habeas corpus* to remove the cause. *Vide* title *Habeas Corpus*.

How to proceed in actions where the defendant is not to be held to bail.

Common capias
to be personally
served.

IF the cause of action does not require bail, or if you mean to serve the defendant with process only, then the *Stat. 12 Geo. 2. c. 29.* enacts, *That in all cases where the cause of action shall not amount to ten pounds or upwards, in any superior court, the defendant shall not be arrested, but shall be served personally with a copy of the process.* And by *5 Geo. 2. c. 27. s. 4.* that upon every copy of such process to be served, shall be written an *English* notice to such defendant, of the intent and meaning of such service, to the effect following: *A. B. you are served with this process, to the intent that you may, by your attorney, appear in his Majesty's court of Common Pleas, at the return thereof, being the day of in order to your defence in this action.* And for which notice no fee shall be demanded.

Notice.

Notice to appear
where debt is
above 10 l., is
requisite.

Notice in all cases where process is served in this court, though the cause of action be above 10 l. has been held requisite. *Barn. 404. But the K. B. held the contrary, 1 Wils. 22.* where the court said, that there was no occasion to put the notice to appear at the bottom of the process according to the *stat. of 5 Geo. 2.* this being above 10 l. *Willis v. Lewis.* Process served without any notice to appear

appear is void. *Cock v. Turner. Cooke's Rep.*
100.

George the third, by the grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to the * Sheriff of Middlesex, greeting: We command you, that you take Peter Roberts, late of Westminster, in your county, mercer, and Richard Roe, of the same place, yeoman, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at Westminster, on the morrow of All Souls, to answer John Denn, in a plea, wherefore with force and arms the close of the said John Denn at Westminster they broke, and other wrongs to him did, to the great damage of the said John, and against our peace; and have you there this writ. Witness Sir James Eyre, Knight, at Westminster, the 19th day of June, in the 33d year of our reign.

The form of a common capias. * Sheriffs of London.

This capias will do in every action, as debt, detinue, covenant, &c. being only to compel the party to appear.

Mr. Peter Roberts, you are served with this process, to the intent that you may, by your attorney, appear † in his majesty's court of Common Pleas, at the return thereof, being the third day of November next, in order to your defence in this action. Indorse the attorney's name, place of abode, and the day sued out, on the copy and writ.

Notice.

Middlesex (ss.) Capias for John Denn against Peter Roberts, trespass at Westminster, returnable on the Morrow of All Souls.

Pracipe.

2d August 1793.

J. P. Attorney.

To be signed by the filacer; pay 2s. 2d. seal 7d. A memorandum or warrant must be made out on a 2s. 6d. stamp, to be filed at the same time.

The word next or instant in the notice is of no consequence, or the year. Barn. 425.

There may be four defendants put in a writ of capias where service only is required, although it be

Four defendants.

† If against husband and wife, say, "Appear for yourself, and Sarah your wife."

not a joint action, the *capias* being considered as mere process to bring the parties into court.

Three things
observable in
process.

In the filling up of process not bailable, there are *three things* to be observed: 1st, In the *notice*, the *very day* of the *return* must be *inserted*, although it happens generally on a *Sunday*. *Barnes* 293. *Alsop v. Nicholls*, 294. *Green v. Watkins*. 2d, The *notice to appear* must be *directed to the defendant* by the same name as the *process*, being particularly so expressed in the act of 5 Geo. 2. 3d, That the *name* of the *defendant* must be *inserted*, as thus: "Mr. A. B. You are served," &c. otherwise the writ may be quashed on motion.

Several defend-
ants.

And if there be several defendants named in the writ, they must also be named in the copy. *Pract. Reg.* 354. And they should be *accurately* named; for if the name in the notice differs from the name in the process, it will be bad. *Barn.* 409. *Cromwell v. Goodwin*.

Notice to appear
on the *quarto die*
post, is good.

Capias returnable fifteen days of *Easter* 8th *May*, the notice was to appear 11th *May*, being the *quarto die post*. Court held the notice to appear on the *quarto die post* was good, that being the day when in point of fact the defendant was to appear. Rule why proceeding should not be set aside discharged.—*N. B.* The old practice of putting notice to appear on the return day, is not done away by this determination. *Sumner v. Brady*. 1 *H. Black. Rep.* 630.

Service on the
return day is
good.

28th of *April* 1768. *E. T.* *This court declared*, That from this day forward, all mesne process served upon the *return day* thereof shall be deemed regular, agreeable to the practice of the court of King's Bench. 2 *Wilf.* 372.

Process not to be
served by a per-
son who can nei-
ther write nor
read.

Court declared, That the service of process by a bailiff, who could neither *write* nor *read*, was not good; and the statute intended that process should not be served by illiterate persons, because it directs that affidavit should be made of the service of a copy of the process. *Delasfield v. Jones*. *Cooke's Rep.*

Rep. 34. Any person who can read writing may serve the copy. *Prac. Reg. 345.*

Process must be served on or before the return day; but if the defendant take the declaration out of the office, he waives the irregularity. *1 H. Black. 222. Whale v. Fuller.*

Process may be served in a peculiar franchise by any person who can read writing, for the statute *5 Geo. 2. c. 27.* does not make such service void. *Hal. v. Bilby. Cooke's Rep. 96.*

The writ need not be shewn at the time of service. *Panchand v. Woolley. Barnes 302.*

The notice to appear to the writ must contain the name of the defendant on whom it is served. *Worgman v. Plank. 1 H. Black. Rep. 100. 1 Wilf. 104.*; or you may move to quash it. The same practice in the K. B. *1 Wilf. 104. Behema v. James.*

If the process be against baron and feme, service on the husband is sufficient for both; and if the husband does not appear for himself and wife, plaintiff may enter an appearance for both. *Barnes 412. Collins v. Shapland & Ux. 406. Buncombe v. Love and Wife.*

A complete and true copy of the whole process must be served. *Pract. Reg. C. P. 354.* If the action be joint, against two or more persons, each must be served with a copy of the process.

Irregularity in service of process may be complained of any time before interlocutory judgment, but not after. *Barnes 269. Wetherball v. Hawes. Pract. Reg. 355. Jemmett v. Voyer.*

If the process be directed into a county palatine, the defendant is to be served with a copy of the process, and not with the mandate thereupon from the bishop, or chancellor to the sheriff. *Barnes 406. Byres v. Whitaker.*

If the defendant complains of an irregularity in the process, or notice subscribed, he must annex the copy to his affidavit, that it may appear to the court.

M 4

A mistake

Waiver.

It may be served in a franchise.

On service need not shew the writ.

Name must be to the notice,

If against baron and feme.

If joint, both must be served.

Irregularity in service to be complained of before interlocutory judgment.

If common process go into a palatine, that to be served.

If complaint is made of any irregularity of process or notice, must annex copy to affidavit.

A mistake in process is cured by appearance.

A mistake in process is cured by defendant's entering an appearance, but not if plaintiff enters it according to the statute. *Westall v. Finch. Barnes* 406.

Service.

Copy of process being tendered to defendant at his house, and he refusing to accept it, held leaving it there was good service. *Wood v. Dodgson. Barnes* 278.—*N. B.* This means at the time.

Put through the crevice of a door.

Copy was put through the crevice of a door to defendant, who had locked himself in, the nature thereof being at the same time explained to him, held good. *Barn.* 405. *Smith v. Wintle.*

Held, that a copy of process inclosed in a letter delivered to the defendant, who opened same and took out the copy, was good service. *Boswell v. Roberts. Barnes* 422.

Process delivered without the filacer's name to it held good. *Rep. & Cas. in pr.* 106. *Morley v. Johnson.* 1 *H. Black. Rep.* 120. *Frost v. Eyles.*

Joint action, all must be served.

In a joint action where there are several defendants, every one must be served before declaration, otherwise fresh process must be sued out: for until all the defendants be served, the plaintiff cannot declare: and if some are not found, the plaintiff must proceed to outlawry against them. *Pract. Reg.* 301.

Capias per continuance.

If the defendant cannot be taken on the first writ, or served with a copy of it, and you do not propose to outlaw him, sue out a *capias* by *continuance*, and in that case you need not put the words in the writ, "*as before we have commanded you,*" for the *præcipe* left with the filacer has the words, "*capias per continuance,*" which shews there has been a former writ; and so the same with the *third*, or any other number of writs: pay signing 10*d.* seal 7*d.* Put on the *præcipe* the day the *first* writ issued.

Capias missing one term in its return, bad.

Capias ad respondendum, tested in *Trinity Term*, and returnable in *Hillary Term* following, missing *Michaelmas*, is void; and plaintiff is liable to trespass and false imprisonment; for he cannot justify under

under a *void* or *irregular process*. 3 *Wils.* 341. *Parsons v. Lloyd*. There is a difference between writs of *mesne process* and writs of *execution*; for in the case of writs of *mesne process*, if a *term* be omitted between the *teste* and *return*, the cause is out of court; but that is to be understood in personal actions. In the case of a *writ of execution* the cause is come to its end. *De Grey Ch. J. vide 1 Lord Raym.* 775. *Shirley v. Wright*, where these distinctions are well taken. 2 *Roll. Rep.* 442. *vide 2 Black. Rep.* 846. S. C.

An advantage cannot be taken of the irregularity of process, without having it returned and before the court. *Perrott v. Heele.* 3 *Wils.* 58.

Special Bail.

Definition of bail.

BAIL, *Ballium* (from the *French* *bailler*, which comes from the *Greek* *βάλλειν*, and signifies to deliver into hands), is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance, at a day and place certain. *Bract. lib. 3. tract. 2. c. 8.*

Why called bail.

The reason why it is called bail is, because by this means the party restrained is delivered into the hands of those that bind themselves for his forthcoming, in order to a safe keeping or protection from prison; and the end of bail is, to satisfy the condemnation and costs, or render the defendant to prison.

Bail and mainprize, the difference.

Bail and mainprize are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, that they save a man from imprisonment in the common gaol, his friends undertaking for him, before certain persons for that purpose authorised, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. *2 Haw. P. C. c. 88. 4 Inst. 180.* The chief difference is, that a man's *mainperners* are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a *Sunday*, confine him till the next day, and then render him. *6 Mod. 231. 12 Mod. 275.*

In *2 Black. Rep. 1273.* It is there held, bail to the sheriff cannot take defendant on a *Sunday* in order to surrender.

Bail to the sheriff is denominated bail *below*, in opposition to that bail which is afterwards put in when

when defendant does appear upon the return of the writ, and which is called *bail above*.

The stat. 23 H. 6. c. 10. allows 20*d.* for an arrest, and the bailiff 4*d.* forfeiture 40*l.* *Vide* 5 Mod. 225. The prothonotaries allow now 10*s.* 6*d.* in town; in the country 1*l.* 1*s.* for arrest; and for taking defendant to gaol 1*s.* per mile, if at a distance. In the King's Bench the master allowed for arrest, in the county palatine of *Lancaster*, 1*l.* 1*s.* each defendant, though the justices had settled 2*l.* 2*s.* each defendant. The court, on motion to review the taxation, said, that the justices in sessions had no authority to fix fees for the court of King's Bench; and that if the bailiffs should in future exact more than the usual sum, they might be guilty of extortion in taking more than was allowed, *colore officii*. 3 Term Rep. 417.

Fees for arrest.

King's Bench determination.

What persons may or not become bail

By rule Mich. 6 Geo. 2. Reg. 5. It is ordered, that after the last day of this term, no attorney of this or any other court, or any person practising as such, shall be bail in any suit or action depending in this court. It has been held, that under this rule articulated clerks to attornies cannot justify as bail. *Laing v. Curdall*. 1 H. Black. Rep. 76.

No attorney to be bail.

Notwithstanding this rule, it has been held, that an attorney, though he cannot be allowed to justify, yet he is sufficient bail to surrender without justification. *Jackson & Trinder*. 2 Black. Rep. 1180.

An attorney may be bail to render.

By rule Hil. 7 Geo. 2. It is ordered, that no sheriff's officer, bailiff, or other persons concerned in the execution of process, shall be permitted or suffered to become bail in any action or suit depending in this court.

No officer to be bail.

It has been determined, that a summoning officer to the sheriff of *Middlesex*, for warning juries, &c. and who was security to the sheriff for his brother, and formerly had been a sheriff's officer

A summoning officer within the above rule.

for serving writs and making arrest, is within the above rule; for the rule is founded upon *principles of prudent jealousy*, and therefore the court would not set a precedent for evading it. *Bolland v. Pritchard*, 2 *Black. Rep.* 799.

Persons outlawed.

Persons outlawed after judgment cannot be bail; nor any one convicted of perjury; and the court of King's Bench allowed him to be asked, whether he has not stood in the pillory for perjury. 4 *Term Rep.* 440. *King v. Edwards*. So a foreigner if he has not property in *England*. 5 *Burr.* 2526. *Boddy v. Leyland*. But in this court, not having effects here, is not sufficient to reject. *Black.* 444. Especially if defendant is a foreigner. *Ibid.* 1323.

A Frenchman permitted to justify.

A Frenchman who had resided in *England* twelve years, in a house at 45 *l. per annum*, as a factor for *Birmingham* goods, and sworn himself worth 2000 *l.* in the bank of *Paris*, but had no considerable property in *England*, was admitted to justify as bail for 180 *l.* the defendant being himself a foreigner. *Andrew Quesnel*, the other bail, not understanding *English*, *Anselme* was sworn to interpret, and upon examination was also justified. *Christie v. Filleul*, 2 *Black. Rep.* 1323.

Bail who live in the verge of the court good.

It is no objection to bail, that he lives within the verge of the court, without other suspicious circumstances, such as being in debt, protested, &c. But it being sworn she was going to leave her house in *Spring Gardens*, and then in treaty for another out of the verge of the court, she was admitted. The other bail sworn and examined by an interpreter. *Glead v. Mackay*. 2 *Black. Rep.* 956.

Within

Within what time to put in bail in London and Middlesex.

The defendant having given a bail bond to the sheriff for his appearance, he must, to discharge such bond, put in special bail to the action; for his appearance can be effected by no other means; by which they become bound either to satisfy the debt and costs, or render their principal into the custody of the warden of the Fleet, provided judgment be given against the defendant, and defendant himself should fail so to do. And such bail above may be put in before the return of the writ, after an arrest, but never before arrest, without consent; for if the plaintiff dislike such bail, he may cause defendant to be arrested, and a bail bond given to the sheriff in a regular way. *Barn. 83. Huggins v. Bumbridge.*

If the defendant's attorney has undertaken to put in bail at the request of the defendant, he may put in bail above to discharge such undertaking, if defendant does not provide bail in due time; and I take it, such bail may take defendant, and render him.

Two persons at least must become bail for the defendant; and in this court, the defendant himself may become bound with them. *Barnes 60.*

By rule *Trin. Term, 30 Geo. 3.* It is ordered, that no bail-bond taken in London or Middlesex on process returnable the first return of any term, shall be put in suit until after the fifth day in full term; and that no bail bond taken in any other city or county by virtue of such process shall be put in suit until after the ninth day in full term; and that no bail-bond taken in London or Middlesex, on process returnable on the second or any other subsequent return of the term, shall be put in suit, until after the end of four days, exclusive of the day on which such process shall be expressed to be returnable; and that

New rule for the settling the practice in relation to the prosecution on bail-bonds.

This rule is explained under title Bail-bond.

Special Bail.

that no bail-bond taken in any other *city or county*, by virtue of such last process, shall be put in suit until after the end of *eight days*, *exclusive* of the day on which such last process shall be expressed to be returnable, on pain of having all proceedings set aside with costs.

The days allowed for putting in bail are reckoned, *exclusive* of the one day, and *inclusive* of the other: the 6th of *November* is the first day of term. Bail is to be put in the 10th this year, as *Sunday* is the last day.

If the last of the four days at any time happen on a *Sunday*, the party has all the next day to put in bail. If the writ be returnable on the morrow of *St. Martin*, being the 12th, then bail is to be put in the 16th of *November*. In eight days of *St. Martin*, being the 18th, bail to be put in 22d. In fifteen days of *St. Martin*, being the 25th, bail to be put in the 29th of *November*.

If a term should begin on a *Monday*, bail must be put in *Friday* evening.

How to put in bail in town on a capias.

Go to the filacer of the county where the writ issued, with an *abstract of the writ*, the *names and additions of the bail*, who will enter them in his book kept for that purpose; deliver him at the same time a memorandum or warrant to defend on a 2s. 6d. stamp, as directed by *stat. 25 Geo. 3. c. 80*; and he or his clerk will attend at the judge's chambers with the bail, and take the recognizance; pay him in term time 12s. in vacation 19s.; if taken at the judge's house, pay 3s. 4d. more: but if the filacer cannot attend, the recognizance may be taken in his absence on a double 12d. stamp parchment, called a *bail-piece*, before a *judge*, upon bringing a true abstract of the writ. *Rule Hil. 8 Geo. 2.* the form of which will be as follows:

In

By aloph Ruck of C. P. the Prince must not enter in the recognizance each of the Bail must acknowledge in double the sum sworn to. Nov 1009.

Special Bail.

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In the Common Pleas.
 Michaelmas Term, in the thirty-fourth year of the reign of King
 George the Third.
 London (Is.) Capias against Richard Fenn, late of London, yeoman,
 J. D. Attorney } at the suit of John Denn, for 100l. upon pro-
 for defendant. } mises, returnable on the morrow of All Souls.
 Affidavit for 50 l.
 Bail are, Richard Knox, of Fleet-street, London, jeweller,
 and
 Taken and ac- } John Mann, of Gutter-lane, Cheap-side, London,
 knowledged, &c. } silversmith.
 The defendant bound in 100 l.
 Each of the bail in 50 l. 100

Bail-piece.

County, must be
 the same as in
 the writ.

If the defendant be not present, and does not enter into the recognizance, then the bail are always bound in double the sum sworn to. If the defendant be present, he is bound in double the sum sworn to; and each of the bail in the sum sworn to.

If the defendant
 is not present.

The attorney at the time of putting in bail must deposit a memorandum or minute of his warrant to defend, stamped with a 2s. 6d. stamp, with the filacer: the form will be as follows:

Memorandum to
 be filed.

In the Court of Common Pleas.

London, to wit. J. D. is retained to defend by Richard Fenn, as his attorney, at the suit of John Denn.
 Warrant to defend.

Entered or filed of record } J. D. defendant's at-
 the day of } torney (if by an a-
 in the 34th year of King } gent, add) by I. M.
 George the Third. } his agent.

In this case you deduct from the fees to the filacer the stamp for the bail piece, 2s.

Time to put in bail may be obtained by taking out a summons before a judge; but his order will be upon terms of putting the plaintiff in the same state.

If the bail be put in in due time, there is no necessity for notice to be given to the plaintiff's attorney; if not, there is. *Dawkins v. Read.* 1 H. Black. Rep. 529.

In

Special Bail.

In the King's Bench notice is to be given. *Vide R. M. 16 Car.*

In the Commons Pleas.

John Denn, Plaintiff,
Between and
Richard Fenn, Defendant.

Notice of bail.

Take notice, that special bail was this day put in with the filacer for the defendant in this cause, before the honourable Mr. Justice Gould, at his chambers in *Serjeant's Inn, Chancery Lane, London*, and the names are *Richard Knox*, of *Fleet Street, London*, jeweller; and *John Mann*, of *Gutter Lane, Cheapside, London*, jeweller; dated the 11th day of November 1793.

Yours, &c.

To Mr. G. H. attorney
for plaintiff.

J. K. attorney for the
defendant.

Description of
bail in notice to
justify.

One of the bail was described of a particular place *dealer and chapman*, where he could only have been described as a *pedlar*. As the plaintiff's attorney had found out the bail, the court held the description would do. Mr. J. Wilson mentioned a case, where one of the bail, in a former action, was described to be a *trader of the company he belonged to*, instead of the *trade he carried on*: this case held to be bad. *Bishop v. L. Mashey, Trin. 33 Geo. 3.*

Of excepting to Bail.

The bail when put in, must be either accepted, or excepted to, by plaintiff.

If the plaintiff is not satisfied of the sufficiency of the bail, he may except against them, and oblige them thereby to appear in open court (*if it be a town cause*) to justify their sufficiency, which is done by their swearing themselves to be *housekeepers* and respectively

respectively worth, if the defendant be bound with them, the sum sworn to; if he be not bound, then double the sum sworn to, after all their debts are paid.

By rule *M. 6 Geo. 2.* It is ordered by the Lord Chief Justice, and the rest of the justices of this court, that from and after the last day of this present term, in all cases wherein bail bonds shall be taken, and the same bail is put in above, the plaintiff may except against such bail.

Curia. We have determined over and over again that the plaintiff may except to the bail, though they are the same persons that became bound to the sheriff; and that defendant cannot move to stay proceedings on the bond, before he has put in and justified bail in the original action. *Boughton v. Chaffey, et al. 2 Wils. 6. Barnes 63. Ormond v. Griffith.*

If the plaintiff be dissatisfied with the bail above, he may except against them at any time within twenty days after notice given of putting in the same. Exception to be in 20 days.

R. 5 W. & M.

Court declared it to be a standing rule in practice, that in all cases of exception to bail, such exception should be made, either in the filacer's book, or on the bail piece. *Busby v. Walker. Cooke's Rep. 55. Satchell v. Lawes. Barnes 88.*

The court held that an exception in writing on the bail-piece, and notice thereof to defendant's attorney, are both necessary. *Goswell v. Hunt. Barnes 101.*

Bail was put in before the return of the writ and previous to the arrest; notice was given: plaintiff's attorney regarded not the notice, but arrested defendant, and he being in custody, moved for a *supersedeas*; and it appearing that plaintiff had not excepted against the bail within twenty days after notice, the court were of opinion that the bail ought to stand, and made rule absolute. *Huggins v. Bambridge. Barnes 81.*

N

"Denn

Notice,

Exception regularly entered, and verbal notice given, yet sheriff is not liable, for notice ought to be given in writing.

"Denn against Fenn. I have excepted against the bail put in for the defendant in this cause. Yours, &c. J. D. attorney for the plaintiff."

Exception entered in filacer's book, of which defendant's attorney had verbal notice, afterwards gave notice to justify, he attempted to justify, but the bail were rejected. Rule to bring in the body expired, and no bail being justified, an attachment was granted. Motion to set it aside. *Cur.* Where there are two parties, and one takes a step previous to which the other ought to have taken a step, the former waives the obligation which the latter was under, as between themselves, but not as relating to a third person. Here the waiver by the defendant if one, was not a waiver by the sheriff. Rule absolute. *Cohn v. Davis.* 1 H. Black. Rep. 80.

Motion to discharge a rule to bring in the body, defendant had put in bail, and no exception. But defendant had given notice of justification. Court held, that though there was a waiver as between the parties, the irregularity was not cured as respecting the sheriff. *Rogers v. Mableback.* 1 H. Black. Rep. 106.

Justification.

If the plaintiff except to the bail, the defendant must give two days notice in all cases, the one day exclusive, and the other inclusive to justify—as Monday for Wednesday. *Barn.* 82. 88. But Sunday is no day; so that Saturday for Monday will be bad. *Ibid.* 303. *Gregory v. Reeves.* Sunday being no day in law, the King's Bench allow one day sufficient notice exclusive to justify, if they be the same bail; but the King's Bench require a notice to be given of the bail being put in. This court otherwise; which I take to be the reason for two days notice being required.

Bail to be perfected in four days after exception.

By the rule *Trin.* 3 & 4 *Geo.* 2. It is ordered, that from and after the last day of this term, if

Special Bail.

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special bail put in by the defendant be excepted to, the defendant shall perfect his bail *within four days after exception taken*; in default whereof the plaintiff shall be at liberty to proceed on the bail bond.

Notice to justify three bail is irregular. You may as well give notice of threescore, and send the plaintiff to inquire after them all over *London*. Bail disallowed. *Allen v. Keyt. 2 Black. Rep. 1122.*

If exception be taken to the bail in vacation, it has been held, that notice to justify need not be given *within four days after such exception*, but at any time in the vacation, so that there be *two days* notice before the *first day of the next term*. *Brown assignee v. Gardner and others. Vide Barnes 101. Fowlis v. Gravenor, same point.*

If exception be in vacation, how notice is to be given.

If after exception and *before justification* plaintiff declares *in chief*, and not *de bene esse* conditionally, it is a waiver, and the bail need not justify. *Cooke's Rep. 81. 156. Barn. 105.* So if before bail justified the plaintiff demands a plea, it is a waiver. *Barn. 92.*

What is a waiver of bail?

If same bail justify.

If the same bail put in are to justify, then the notice of justification will be thus:

In the Common Pleas.

Denn v. Fenn.

Take notice, that the bail already put in for the above defendant in this cause, *and of whom you have had notice*, will, on *Thursday the 14th of this instant November*, justify themselves in open court, as good and sufficient bail for the defendant. Dated this 12th day of *November 1793.*

Notice of justifying the same bail.

If no notice already given, add the names and additions of the bail.

Mr. J. K. Attorney
for Plaintiff.

Yours, &c.
J. B. Attorney for the
Defendant.

N 2

If

Special Bail.

If defendant changes his attorney without leave of the court, and gives notice of justifying his bail by his new attorney, it is irregular, and plaintiff is not bound to accept such notice. *2 Black. Rep. 1323. Kaye v. De Mattos. So in King's Bench. Doug. 217.*

Notice must be served on plaintiff's attorney personally, or on one of his clerks; it may be left at his house with his servant.

How to justify
in court.

The affidavit
may be sworn in
court of the ser-
vice of notice.

The evening preceding the day of justification, an affidavit on the above notice is to be made on a treble sixpenny stamp paper; which is to be sworn before a judge; pay for the oath 2s.; then speak to the filacer, to attend with the bail-piece, or book in which the names of the bail are entered, at *Westminster*; pay him for same 5s. 4d. give your affidavit to a serjeant with instructions thereon indorsed, "*To move to justify the within bail,*" fee 10s. 6d.: have your bail ready at the sitting of the court, who will be called for; and when sworn, pay the fees of the court to one of the criers, *viz. 3s. 6d.* This being done, in the evening go to the Secondaries Office, No. 1, *King's Bench Walks*, in the *Temple*, and get the rule for the allowance of bail drawn up; pay 4s. 6d.; serve the plaintiff's attorney with a copy; and it is a rule in this court, in all cases, *to shew the original rule at the same time.* The rule must be drawn up and served. The King's Bench have held, that unless it be so, bail is not perfected. *4 Term Rep. 493.* When this is done, the bail are perfected, and if declaration be delivered, the plaintiff's attorney may now demand a plea.

In the Common Pleas.

John Denn, Plaintiff,
Between and
Richard Fenn, Defendant.

Affidavit of the
service of notice
of justification.

J. G. clerk to *E. H.* of, &c. attorney for the
defendant in this cause, maketh oath and saith,
That

That he did, on the 12th day of Nov. instant, personally serve J. K. the plaintiff's attorney, with a true copy of the notice hereto annexed.

If you serve the servant of plaintiff's attorney or clerk, say, "*Served Mr. J. K. the plaintiff's attorney in this cause, with a true copy of the notice hereto annexed, by delivering the same to the clerk, or servant of the said J. K. at his house in Serjeant's Inn, in Fleet-street, London.*"

Bail cannot justify at a judge's chambers in vacation, unless by consent, although the attorney for the plaintiff attended and examined them. *Hawkins v. Plomer and another. 2 Black. Rep. 1064. Barnes 101.*

Cannot justify at chambers.

The practice of the King's Bench is otherwise where a defendant is in custody.

To save expence, the attorney for the plaintiff frequently accepts of the bail being justified before a judge, if he is satisfied of their sufficiency; in this case the plaintiff's attorney attends in person, or gives a note in writing to the filacer of such his consent; then go with the filacer to the judge's chambers, and the bail, who will justify before the judge, pay filacer 5s. 4d. The court of King's Bench having said, that a fee to the attorney for the consent should no longer be endured, I should not advise an attorney in this court to accept one.

How to justify at chambers.

Of opposing the Bail.

When bail are brought up to justify, they may, and frequently are opposed; the grounds of which are various: as, that he is an attorney, or an attorney's clerk, sheriff's officer, bailiff, or other person concerned in the execution of process, keeper of any prison, Marshalsea-court officer, serjeant at mace, summoning officer of the Sheriff's court to warn juries. *2 Black. Rep. 799.* Persons outlawed after judgment, persons convicted of perjury. *2 Black. 956.* not a housekeeper, not being worth double the sum sworn after payment of all their

H. Black. Rep. 76.

R. H. 7 Geo. 2.

Special Bail.

just debts, uncertificated bankrupts, persons assuming fictitious names, 21 *Jac.* 1. c. 26. s. 2. 4 & 5 *W. & M.* c. 4. s. 4. being liable to be put in the pillory, persons having been frequently become bail before, without being able to say how often, or what sums, or in what actions, *after the expiration of the rule to bring in the body*; and lastly, a ground of opposition is any defect or irregularity in the notice of putting in or of justifying bail, or in the service thereof. In case of added bail, if they have not become so before any notice of justification. 1 *H. Black. Rep.* 291.

Of adding Bail.

If the same bail that are put in, *are not to justify*, and you mean to *add and justify fresh bail*; in that case, before the notice to justify such bail is given, *you must add the bail to those already put in, before the time that notice for the justification of such new bail is delivered*, as will appear by the following rule of *Mich. Term*, 18 *Geo.* 3. It is ordered by the court, that from and after the last day of this present term, no persons who shall become special bail for any defendant or defendants, in any action or suit depending in this court, shall be permitted to justify themselves in open court as good and sufficient bail for any such defendant or defendants, unless such persons *did actually become bail for such defendant or defendants, before the time that notice for the justification of such bail was delivered to the plaintiff's attorney or agent.*

Additional bail must be put in before notice of justification can be given.

Bail must actually have become so, before notice of justification is given.

The additional bail were going to justify, when it was objected by *Bond, Serjeant*, that it appeared from the notice of justification, that they had not *actually become bail, before that notice was given*, according to the above rule. This was holden to be a sufficient objection, and the bail were rejected. *Collier v. Godfrey.* 1 *H. Black. Rep.* 291.

Additional bail are to justify, though not excepted to.

If after exception to the bail put in, the defendant wishes to add further bail, the additional bail must be added, and also justify themselves in court, *within*

Special Bail.

within the four days after such exception, without waiting for a new notice; for the court do not oblige the plaintiff to make exception to such new bail; and in default of justifying, he may proceed on the bail-bond.

By this rule, it doth not strike me that there is any necessity for giving notice of the adding such bail *separately*, but a notice that they *are added* to the bail already put in, and that they will on such a day *justify*, two days notice (exclusive of the one day, and inclusive of the other) will do—*Wednesday for Friday*.

Notice that bail would be *added* and *justify* on same day, the court held it a bad notice. *E. T. 33 Geo. 3. Anon.*

In the Common Pleas.

John Denn, Plaintiff,
Between and
Richard Fenn, Defendant.

Take notice, that *Aaron Moses*, of *Duke's Place*, London, merchant, and *George Duke*, of *Hatton-street*, near *Holborn*, in the county of *Middlesex*, broker, did this evening add themselves to the bail already put in for the defendant in this cause, before the honourable Mr. Justice Gould, at his chambers in *Serjeant's Inn*, *Chancery-lane*, London; and that they the said *Aaron Moses* and *George Duke* will, on *Thursday* next, justify themselves in open court as good bail for the said defendant. Dated this 12th day of *November* 1793.

Notice of adding
and justifying
two bail.

Your's, &c.

To Mr. G. H. Attorney
for the Plaintiff.

J. K. Attorney for
the Defendant.

If you add but one to the bail already put in, and he with one of the other justifies, then your notice will be as follows, after such one has been added and put in before the judge, according to the new rule.

N 4

Take

Special Bail.

Notice of adding
and justifying
one bail.

Take notice, that *E. F.* of, &c. was last night added to the bail already put in for the defendant in this cause, with the filacer, before the honourable Mr. Justice Gould, at his chambers in *Serjeant's Inn, Chancery-lane, London*; and that he, together with *John James*, one of the bail already put in for the said defendant, and of whom you have already had notice, will, on *Thursday* next, justify themselves in open court as good and sufficient bail for the said defendant. Dated, &c.

Take the added bail to the judge's chambers, with the filacer; pay him for adding 7*s.* 4*d.* and then you proceed to justify as before.

Cases respecting Bail.

One bail esteem-
ed as no bail,
not sufficient to
surrender.

Two persons at least must become bail for the defendants; the putting in one bail only is esteemed as no bail, not even sufficient to ground a surrender upon, though it be done immediately; and the plaintiff in such case may proceed on the bail-bond notwithstanding the surrender. *Barnes* 60. *Steward v. Bishop*.

Of exonerating
bail.

If bail are excepted to, and do not justify, but others are added, who do, the names of the former bail still continue on the bail piece, until a rule of court be made for striking them out: therefore they must move the court, or apply to a judge by summons, to be exonerated. *Vide* 1 *Black.* 462. *Say* 309. *Bur.* 2107. 1 *Wils.* 337.

Of Surrender before justifying.

If the plaintiff has taken the bond and put it in suit, bail must justify before surrender. *M.* 31 *Geo.* 3.

Bail excepted to
and not justifying,
are as no
bail.

When bail is excepted against and cannot justify themselves, they are considered as no bail, and therefore

therefore cannot render the defendant to prison; but other fresh bail may be put in, and before any exception taken on them, they may render him to prison in discharge of themselves. *Per totam curiam.* 3 *Will.* 59.

After many nugatory notices of justification, the defendant's bail appeared in court to justify. One was allowed, and time given to enquire after the other. On the same night the same bail, one not being justified, surrendered the defendant in discharge. *Groje* moved for an attachment against the sheriff, for not bringing in the body. *Walker* shewed for cause the surrender; to do which the bail need not justify: and of that opinion was the court, and discharged the rule, upon *Crosley* the attorney's consenting to pay the costs of the frivolous notices to justify. *Mitchell v. Morris.* 2 *Black. Rep.* 1179.

Bail need not justify, in order to surrender, though a rule to bring in body.

Notice of bail 11th of *May* given—the 17th exception entered—Rule to bring in the body on that day, and served on sheriff—On 19th notice of justification was given for 21st—The 21st bail came and were rejected; on which day rule to bring in the body expired. Before rising of the court, application was made for leave to put in other bail immediately for the purpose of rendering the defendant, who was then in court. Leave was given, and render was made at the rising of the court, and defendant committed. 23d an attachment issued against the sheriff for not bringing in the body—Rule to shew cause why it should not be set aside. It was shewn for cause, that where a rule to bring in the body was served, bail must be justified; but where there was an exception only, and no rule to bring in the body served, then the principal might be rendered without justification. 2 *Black. Rep.* *Poole v. Peate.* But the court held there was no good reason for the distinction, and that any bail were sufficient for the purpose of rendering

Though a rule to bring in the body has been served, bail may render the defendant without justifying. Though bail are rejected, new bail may be put in for the purpose of render. Formerly otherwise.

dering the defendant without justifying, and made the rule absolute. *Hall v. Walker.* 1 *H. Black. Rep.* 638.

Two persons, not worth a groat, may put in bail for the purpose of rendering,

Upon the 14th of November 1783, bail above was put in, and excepted to; upon the day of justification, the bail brought the defendant into court, and prayed that they might be at liberty to surrender defendant without justifying. Court held, that the bail might do this, and allowed the surrender; and Mr. Justice Gould said, that two persons, not worth a groat, might put in bail for the purpose of surrendering: Mr. prothonotary *Dickins* mentioned two cases wherein the above practice was established in this court, viz. *Jackson v. Morris*, and *Richardson* against same. *M. T.* 1783. *Wardle one, &c. v. Bowland.*

But bail surreptitiously put in, cannot surrender the defendant.

But in two cases wherein the sheriff was ruled the 11th of November, to bring in the body of the defendants, it appeared, that upon the 14th bail were justified and allowed in court: on the 19th of November, the court was moved to set the allowance aside, the bail being surreptitiously put in and justified; which rule, on the 27th of November, was made absolute. In the mean time, on the 21st of same month, the bail surrendered the defendant. The court held, that as the bail was put in surreptitiously, they were as no bail, and therefore could not surrender; and made absolute the rule for an attachment. *Jackson v. Morris.* 2 *Black. Rep.* 1179.

If bail be ready before attachment, cannot move for it.

The rule to bring in the body had expired: the next morning at sitting of the court a serjeant had instructions to move for an attachment against the sheriff. The bail attended before motion, and a serjeant also moved to justify, but plaintiff's serjeant insisted on his motion. *Per Cur.* This is a case the court will not admit of. We have in several instances laid it down as a rule, that if bail are ready to justify before the attachment, they may; but we will not suffer the attachment to be moved for first.

The

The court also refused to give the costs of preparing to move for the attachment. *E. T. 33 Geo. 3. 29th of April.*

Bail put in in time, but did not come to justify pursuant to notice. The defendant's attorney gave a new notice for the next day; and the court gave the bail leave to justify waiving the necessity of giving two days notice as usual on payment of the costs of the first attendance. *McCormick v. Foulger. M. T. 33 Geo. 3.*

When one day's notice will do.

The defendant had changed his attorney without leave of the court, as required by rule *M. 1654. f. 13.* and gave notice of justifying by his new attorney; held irregular, and that plaintiff is not bound to accept such notice. *Kaye v. De Mattos. 2 Black. Rep. 1323.*

Cannot give notice by a new attorney to justify, unless he is changed.

One who is bail cannot be a witness in the cause for his principal; therefore, if defendant shall have occasion to examine one of his bail as a witness, he must make an affidavit that such bail is a material witness for him in the cause, and thereupon move the court, that such bail may be struck out of the bail-piece, on adding and justifying another in his stead: but the affidavit must state, that he is a *material witness*. This is a rule to shew cause, though in point of fact there can be no material objection. *Whatley v. Fernley. E. T. 33 Geo. 3. Barnes 69. Young v. Wood.*

Bail cannot be a witness for the defendant.

Of putting in Bail in the Country, and transmitting it.

By the 4 & 5 *W. & M. c. 4.* The chief justice, &c. of the different courts, and chief baron, may, by commission, empower persons other than *common attorneys* and *solicitors*, in all and every the usual shires and counties, to take and receive recognizance of bail, as any persons shall be willing to acknowledge in any suit depending in the said courts, in such manner and form, and by such recognizance

Chief justice, &c. may make any persons, except attorneys and solicitors, commissioners to take bail in the country.

Special Bail.

cognizance or bail piece, as the justices and barons have used to take the same, which shall be transmitted to the court where such action shall be depending, who, upon affidavit made of the due taking thereof by some credible person, at the taking thereof, such justice or baron shall receive the same.

Power given to justices, &c. to make rules for justifying by affidavit.

Sec. 2. Power is given to the justices and barons to make rules for justifying such bail, by affidavit duly taken before the said commissioners, who are hereby empowered and required to take the same, and also to examine the sureties upon oath, touching the value of their respective estates. The third clause empowers justices of assize, in their circuit, to take such bail in a similar manner. The fourth and last section, makes it felony for one to be bail in another's name.

How long defendant has to put in bail in a country cause.

The defendant is to put in bail on a writ of *capias*, returnable the *first* return of the term, *within eight days* after the *first day* of term, being the 6th of *November*, which will be on the 14th. But if the writ is *returnable* on any *other return*, then *within eight days next after the return day of such writ*. As for example, if the writ be returnable on the morrow of *St. Martin*, the 12th of *November*, bail must be put in on the 20th. So if it be ret. in eight days of *St. Martin*, being the 18th, it must be put in on the 26th. And the bail-piece must be *actually filed within that time*, with the filazer.

How to put in bail before a Commissioner.

How to put in bail.

The bail-piece is filled up by the defendant's attorney, in the form mentioned in p. 175; go with the bail to a commissioner, who will take the recognizance, for which pay 2s.; and it is usual for the attorney at the same time to have an affidavit ingrossed on treble 6d. stamp paper, of the justification of the bail, which may be sworn before the commissioner who took the same, 4 & 5 *W. & M.*

c. 4. As soon as this is done, prepare also an affidavit of the due taking of the bail, which must be sworn before a *commissioner* (*not the person who took the bail*), which is engrossed likewise on a treble 6 d. stamp paper; this being done, annex the same to the bail-piece, and send the whole to the agent in town, so that he may get it allowed and filed *within time*. If filed *in time* notice is not necessary.

In the Common Pleas.

John Denn, Plaintiff,
Between and
Richard Fenn, Defendant.

Thomas Jones, of *Newport*, in the county of *Bucks*, gentleman, maketh oath and saith, That the recognizance of the bail or bail-piece hereunto annexed, was duly acknowledged by *John Brown*, of *Newport* aforesaid, grocer, and *James Rogers*, of the same place, farmer, the bail therein named, before *E. F. Esquire*, the commissioner who took the same in this deponent's presence, the 13th day of *November* instant.

Affidavit of the due taking of bail in the country, to be sworn before a commissioner, not the person authorised to take same.

Sworn, &c.

T. J.

Also it is usual for the attorney in the country, to send to his agent, at the same time, an affidavit of the justification.

In the Common Pleas.

John Denn, Plaintiff,
Between and
Richard Fenn, Defendant.

John Brown, of *Newport*, in the county of *Bucks*, grocer, and *James Rogers*, of the same place, farmer, bail for the defendant in this cause, severally make oath and say; and first this deponent, *John Brown*, for himself saith, That he is a housekeeper in *Newport* aforesaid, and that he, this deponent, is worth two hundred pounds, over and above what will pay all his debts; and this deponent, *James Rogers*,

Affidavit of justification.

N. B. This may be sworn before the commissioner who took the bail.
Barnes 67.

Special Bail.

Rogers, for himself saith, That he is a housekeeper at *Newport* aforesaid, and is worth two hundred pounds, over and above what will pay all his debts.

And J. K. Esq. will

Sworn, &c.

both names must be inserted in writ at 17 Geo. 3.

On receipt of bail-piece, memorandum or warrant must be filed on a 2s. 6d. stamp.

Upon receipt of the bail-piece, and affidavit of the caption, the agent then applies to a judge for his *allocatur*; pay 5s. in term; in vacation 12s.; then file the same with the filacer of the county wherein the bail is taken; pay in term 6s. in vacation 6s.; the agent for the defendant may give notice thereof to the agent in town for the plaintiff, which will be as follows; and note, fair practisers make a copy of the affidavit of justification, and send with the notice.

In the Common Pleas.

Between *John Denn*, Plaintiff,
and
Richard Fenn, Defendant.

Notice of bail being filed.

Not absolutely necessary if filed in time.

Take notice that special bail was on the 13th day of *November* instant, put in for the above-named defendant, before *E. F.* Esquire, a commissioner appointed to take special bails in and for the county of *B.* and the names are, *John Brown* of *Newport*, in the county of *Bucks*, grocer, and *James Rogers*, of the same place, farmer, which have been allowed by the honourable Mr. Justice *Gould*; and the bail-piece, together with the affidavit of the due taking thereof, is filed with the filacer of the said county. Dated the 14th day of *November* 1793.

Yours, &c.

To Mr. *P. C.* Attorney
or Agent for Plaintiff.

J. K. Agent for
Defendant.

N. B. The agent may, if he thinks proper, file the affidavit of justification, which is usually sent with the bail-piece (for fear there should not be time, after

after exception, to get it so as to justify) at the same time with the filacer, who takes two shillings.

Of Exception and Justification.

This being done, the agent in town for the plaintiff enters his exception *within twenty days*, which is done at the filacer's under the bail-piece; and notice must be given of such exception to the defendant's agent, who has *four days* afterwards to justify such bail by *affidavit*. Exception to be within 20 days.

N. B. The same form does as in town with respect to the exception; but in the notice of justification, you say, "*The bail will justify themselves in open court by affidavit.*" Notice of exception and justification.

The plaintiff's serjeant may oppose these bail in the same manner as if they attended in person, and the judges may disallow the same; for they are only conditional till the *twenty days* expire. May be opposed.

If the justification is insisted upon, affidavit must be made of service of the notice of justification, and indorse thereon thus: "*Denn v. Fenn, Mr. Serjeant Bond half a guinea, to move to justify the within bail by affidavit.*" Speak the overnight to the filacer, to bring the affidavit to *Westminster*; pay him his fee, 3s. 4d. Attend the next day, and pay the court fees, 3s. 6d. But amongst *fair agents* this is very seldom done, as they usually accept the justification by filing the affidavit with the filacer, if not done at the time of filing the bail-piece; pay consent 10s. 6d.; but if they justify, the rule for the allowance must be drawn up, and served on plaintiff's agent. How to proceed after exception.

When the act of the 4 & 5 W. & M. was made, in order to regulate the taking of bails before commissioners, it became necessary for this court, in the fifth year, to make the following rule:

Before any bail shall be taken by virtue of the said act, a true copy of the writ on parchment, to which the defendant is to put in bail, shall be brought to That a true copy of the writ be on parchment, and the bail-piece thereon ingrossed.

to the commissioner before whom such bail is to be taken; and thereupon the recognizance or bail-piece shall be fairly drawn and ingrossed on the said parchment copy, in this or the like form, as the case shall be, viz.

Bail-piece.

The bail, *John Denn*, of *Blackbarnesley*, in the parish of *Settle*, in the county of *York*, Gent. and *Richard Fenn*, of the same, Gent.

A. B. attorney for } The defendant in 20 l.
the defendant. } Each of the bail in 10 l.

Taken and acknowledged the 10th day }
of *March*, in the year of our Lord }
1692, conditionally, before me, *A. B.* }
one of the commissioners.

Defendant not
present, bail in
double the sum.

If the defendant be not present, then the bail are usually bound in double the sum sworn to, otherwise only single.

The condition of which said recognizance shall be to this effect, viz.

The condition of
the recogni-
zance.

You (naming the defendant, if present) do acknowledge to owe unto the plaintiff twenty pounds; and you (naming the bail) do severally acknowledge to owe unto the same person the sum of ten pounds a-piece, to be levied upon your several goods and chattels, lands and tenements, upon condition, that if the defendant be condemned in the said action, he shall pay the condemnation, or render himself a prisoner to the Fleet for the same; and if he fail so to do, you (naming the bail) do undertake to do it for him.

Affidavit of the
due taking.

That the affidavit of the due taking of every such bail shall be made, either before some judge of the Common Pleas, to whom the bail shall be transmitted, or before some person who shall have power to take affidavits in matters and causes depending in the said court.

Commissioners
to keep books
to enter bails.

Every commissioner is to have a book, kept purposely for entering exactly the names of the defendant and his bail, and of the plaintiff, as it is in the bail-piece; and the time of taking thereof, and the name

name of him by whom such bail shall be transmitted.

That the plaintiff's attorney shall be at liberty to repair to the commissioners book for the names of the bail, to the end that they may enquire of the sufficiency of them; and if they are found insufficient, they may except against them within *twenty days* after the said bail is transmitted, and notice to the plaintiff or his attorney of the taking thereof. And in that case, the defendant must either put in better bail, or the cognisors of such bail must justify themselves in open court, either by affidavit taken before such commissioner that took the said bail, or by oath made in court, or before one of the judges of the said court.

Plaintiff's attorney to have recourse thereto.

By rule *Hil. T. 6 Geo. 1.* It is ordered, That all bails taken by commissioners, pursuant to the act for taking special bails in the country, shall be transmitted to the lord chief justice, or to one of the justices of this court, *viz.* every bail taken within *forty miles of London*, within *ten days* after the caption thereof; and every bail taken above *forty miles from London*, within *twenty days* after the caption thereof; unless all the said justices shall be in their circuits; and then as soon as any one of them shall be returned to *London* out of his circuit, being the time prescribed by the orders of this court to be observed by the commissioners; and after such transmission, shall be forthwith delivered to, and filed with the proper officer, to be entered upon record, or otherwise it shall be as no bail; and the plaintiff is at liberty to proceed on the sheriff's bond, as if no such bail was ever put in; and the defendant, in case he be admissible to plead to the original action, shall not be admitted so to do, unless he first pay the full costs to the plaintiff for the prosecution on the bail-bond; and plead as of the time when the bail should have been duly entered.

Transmitting and entering of bail taken in the country.

By rule *M. 13 Geo. 1.* It is ordered, That all bails taken before commissioners in the country, and

Filing bail-pier after transmitted.

and transmitted to, and allowed by the lord chief justice, or one of the justices of this court, shall be delivered to the clerk of the said lord chief justice, or such other judge as shall allow the said bail, which clerk shall take the fees due to the proper officer for the entry thereof; and shall forthwith deliver the said bail to be filed, and pay the said fees to such proper officer.

One of the bail acknowledged in the country, the other in town not allowed.

One of the bail was acknowledged at *Worcester*, the other added on the bail-piece and was taken in *London*; the bail-piece was taken to a judge's chambers to acknowledge the bail in *London*, and the judge doubted. This was referred to the treasury chamber, and the judges held, that bail might both be put in before the same commissioner at *different times*, provided the caption was complete within the time allowed by the rules of the court. But refused to allow the above bail. *Hil. T. 1782.*

If the defendant be held to bail by order of a judge, the *affidavit* on which such order is made, must be filed with the filacer for the county wherein the writ issues, and he marks on the bail-piece, what sum bail is given for by such order.

Bail-Bond.

How to proceed upon the Bail Bond.

AT common law the only mode of redress which a plaintiff had, when defendant neglected to put in bail or perfect same, was to proceed against the sheriff by an amercement; unless the sheriff suffered the bond to be put in suit against the principal and his bail, wherein his name was made use of; in this case the sheriff might have executed a release, which would have obliged the plaintiff to have gone into a court of equity for relief. To remedy which, the *Stat. of 4 & 5 Ann. c. 16.* was made, whereby the sheriff is bound to assign the bond to the plaintiff at his costs.

If bail above be not duly put in, or if put in and excepted to, they do not justify in due time, the plaintiff has his election either to take an *assignment of the bond*, or *rule the sheriff to return the writ*, and afterwards to bring in the body: the latter of which will be treated of under a separate head.

By rule *Trin. Term, 30 Geo. 3.* it is ordered, that no bail-bond taken in *London or Middlesex* by virtue of any process issuing out of this court, returnable on the *first return* of any term, shall be put in suit, until *after the fifth day* in full term; and that no bail-bond taken in any other city or county by virtue of such process, shall be put in suit until *after the ninth day* in full term; and that no bail-bond taken in *London or Middlesex*, by virtue of any process issuing out of this court, returnable on the *second* or any other subsequent return of the term, shall be put in suit, until after the end of *four days exclusive* of the day on which such process shall be expressed to be returnable; and that no bail bond taken in any other city or county, by vir-

New rule for the settling the practice in relation to the prosecution on bail-bonds.

tue of such last-mentioned process, shall be put in suit until after the end of *eight days exclusive* of the day on which such last mentioned process shall be expressed to be returnable, on pain of having all proceedings made upon such bonds to the contrary thereof set aside with costs, any former rule or order of this court to the contrary thereof notwithstanding. The rule of *Hil. 9 Ann. reg. 4.* is at an end.

Explanation on
first return.

If a writ be returnable on the morrow of *All Souls* in *London* or *Middlesex*, bail must be put in on the 11th day of *November* in the evening, this year *Sunday* being the last day. If in any other city or county, bail must be put in on the 14th day of *November*, or the bond may be assigned the 12th in the first case; the 15th in the second.

If the first day of Term should be on a *Monday*, and writ returnable the *first return*, bail should be put in on *Friday* in a *town cause*, or bond may be assigned on *Saturday* morning in a *country cause*, and writ be returnable the *first return* of the term; bail must be put in on *Tuesday*, or bond may be assigned on *Wednesday* morning.

Explanation on
any other return.

If a writ be returnable on the *second* or any other return of the term, then the days are to be accounted from the return day, viz. *four days exclusive* of the return day in *London* or *Middlesex*, and *eight days exclusive* in any other city or county, *exclusive* of the first day, and *inclusive* of the last.

N. B. If the last day for putting in bail happen on a *Sunday*, then the bail have all the next day.

The above rule was made in consequence of the following determination, which is not in print.

The case of
White v. Girdler.

A *capias* was issued in *Middlesex*, returnable in eight days of the *Holy Trinity*, being the second return of that term, and the 18th of *June* 1786; no bail being put in on the 26th of *June*, the bond was assigned and put in suit. Bail was put in on the 26th in the evening, and notice served. Motion to set aside the proceedings on the bond; the court held, that the appearance day mentioned in the rule
of

of *Hilary 9 Ann.* was (after the first day of the term) to be considered on the *general return day* being in full term; so that bail ought to have been put in on the 22d of *June*. *Mr. Roberts*, the filacer, certified, that for above twenty years all bails were put in on the 2d, or any other return of the term, (except the first,) *within four days next after the return day*, in town causes. Rule discharged. *White v. Girdler. Trin. 26 Geo. 3.*

By *Stat. 4 & 5 Ann. c. 16. s. 20.* it is enacted, That the sheriff, at the request and costs of the plaintiff, or his lawful attorney, shall assign to the plaintiff the bail-bond, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment, so indorsed, *be duly stamped before any action brought thereon*; and if forfeited, the plaintiff may, after such assignment, bring an action thereupon in his own name, and the court may give such relief to the plaintiff and defendant in the original action, and to the bail on the said bond, as shall be agreeable to justice and reason; and each rule of court shall have the effect of a defeasance to such bail-bond.

Sheriff, on request, to assign bail-bond to the plaintiff;

who may bring an action in his own name.

Before taking the assignment of the bond, the plaintiff's attorney should be satisfied that the bail taken by the sheriff are good; for by accepting of such assignment, he cannot resort to the sheriff, *unless by action at law*, which is too hazardous to bring for such insufficiency. *Vide 1 Wils. 223. Salk. 99.*

Plaintiff's attorney should, before assignment, be satisfied of the sufficiency of the bail.

Proceeding on the Bond.

If the bail be not put in in due time, or if put in they be excepted to, and they do not justify in due time, the plaintiff's attorney in *Middlesex* applies to the under-sheriff, at his office in *Took's Court, Curfitor-street*; or if in *London*, to the *secondaries*, whose office now is in *Grocer's Alley, in the Poultry*,

How to apply for the assignment of the bond in town.

In the country. for the assignment of the bond; pay five shillings. But if the writ be in the country, then apply to the under-sheriff there, who sends same to his agent; the usual charge is 6s. 8d. and one shilling for postage.

Action thereon. Take this assignment to the stamp-office in the Strand, and get it stamped with a double six-penny stamp; you may then sue out writs against the bail and principal; serve them with copies thereof, and proceed as in other actions. If one writ is sued against the bail and principal, you may declare jointly or separately on the bond as you please.

To be in the same court.

N. B. The plaintiff in the writ is usually named "*Assignee of the sheriff*," and the action must be brought in the same court wherein the original writ was sued out, for that court only hath jurisdiction and cognizance of the action. 2 Black. Rep. 838. 3 Wils. 348. *Morris, assignee, v. Rees. Barnes 117. How v. Bridgewater.* If brought otherwise, proceedings will be staid, though after plea pleaded. *Ibid.* 839. *Morris v. Rees.* But if the action be brought by the sheriff himself on the bond, he may bring it in another court, for the Stat. 4 Ann. does not extend to the sheriff himself. *Newan & an. v. Fawcitt.* 1 H. Black. Rep. 631.

Sheriff himself.

Where you proceed on the bail-bond, all proceedings in the original action cease. The venue may be laid in any county. *Str.* 727. 2 *Ld. Raym.* 1455.

Attorney waives his privilege by entering into bail-bond.

If an attorney be named in the bond, the action must be brought in the same court where the process was issued; for by his entering into such bond, he waives his privilege, whether sued jointly or severally. *Barnes 117. How v. Bridgewater, one, &c.* And the bail in such bond are not to be held to special bail, but served with process only.

After exception bail added, but did not justify. Proceedings on the bond regular.

After an exception to bail put in before a judge, defendant added bail, but did not justify in court, pursuant to the rule for perfecting bail in four days. Plaintiff proceeded on the bail-bond without excepting

cepting against the bail, and held regular. *Barnes*

74. *Gregory v. Gurdon.*

Defendant indebted to plaintiff in 620*l.* was arrested by process, returnable 3d of *November* 1771, and gave bail-bond. The plaintiff was paid 400*l.* in part, and took an order from defendant for payment of 280*l.* which was never paid. Plaintiff had also a mortgage by way of collateral security. In *September* 1772, defendant became a bankrupt, and then plaintiff assigned the bail-bond; on 12th of *November* 1772, he proved his debt under the commission, and same day served the bail with process. Motion to stay proceedings on the bond.

Bail-bond cannot be assigned when the original suit is out of court, he must declare before essoign day of third term;

Per Cur. We shall waive going into the special circumstances. The rule is, that after the return of the process, the plaintiff shall proceed with such diligence as to be in a condition to declare within two terms, or shall put in a declaration *de bene esse*. Here no declaration is delivered, no appearance entered, no return of the writ called for, and of course plaintiff has not declared in the original action. It was held in *Higgins v. Whitell*, this term, that if plaintiff does not declare before the essoign day of the third term inclusive after the return of the writ, he has deserted his cause and is out of court; and being so, he cannot take an assignment of the bond, for the suit must be depending when the bond is assigned. Rule absolute. *Sparrow v. Naylor and others.* 2 *Black. Rep.* 876.

or cannot put bond in suit.

The practice is otherwise in *King's Bench*; for though plaintiff does not declare within the two terms, yet he may afterwards take the bond. 2 *Str.* 1262.

A bail-bond may be sued by the executor of the assignee. *P. Reg.* 68. *Nott v. Stevens.*

Executor of assignee may sue.

Terms on which the Court will stay Proceedings on the Bond.

Stay of proceedings.

In case defendant, by neglect, has suffered the plaintiff to take an assignment of the bond, and would wish to stay the proceedings thereon and try the cause, he must, in *Term time*, move the court for that purpose on a special affidavit containing merits, which will be granted upon paying the costs incurred, receiving a declaration in the original action, pleading *issuably*, and taking short notice of trial, so as not to delay the plaintiff, the bail consenting that judgment be entered against them on the bail-bond for the plaintiff's security.

Bail must be perfected before proceedings on the bond can be staid.

Curia: We have determined over and over again that the plaintiff may except to the bail above, though they are the same persons that became bound to the sheriff; and that defendant cannot move to stay proceedings on the bail-bond, before he has put in, and justified bail in the original action. *Boughton v. Chaffey. 2 Wils. 6.*

Of the notice of motion.

The motion, as well as summons, should be intitled in the original action. It is incumbent on the defendant, after taxation of the costs, to pay them, or plaintiff may proceed. If motion be made to stay proceedings on the bond after bail perfected, notice should be given to plaintiff's attorney of the motion, and add, "*Why in the mean time all proceedings should not be staid*;" otherwise this court will not add those words to the rule.

Bail cannot render if judgment against them.

When the proceedings on the bond are staid, and judgment signed against the bail, the bail cannot discharge themselves by a surrender. *Barn. 85. Otway v. Cockayne.*

Defendant may be let in to try the merits.

The court will let in defendant to defend where he has merits, though bail have been sued; and plaintiff lost a trial, the bond standing as a security;

nty; but judgment must be entered against the bail.
Barn. 74. Birch v. Graves.

If the Bond be assigned irregularly.

If the proceedings are irregular, application must then be made by the defendant to set them aside upon an affidavit stating the particular facts; such as, *the writ having issued, the return, the defendant's arrest, the day bail above put in*, and that the bail were served with writs, &c. on the bail-bond. If proceedings be irregular.

For the irregularity may arise either in the writ, exception to the bail, or proceeding on the bond before forfeited, or the manner in which the declaration has been delivered or filed. In what it may arise.

I take it, that plaintiff cannot proceed to take an assignment of the bond, pending a rule to set aside the proceedings for irregularity. So in King's Bench. *Vide 4 Term Rep. K. B. 176.* Pending motion cannot take bond.

The court ordered all proceedings to be staid; it appearing that the defendant in the original action died before judgment could have been obtained thereon against him. *Castell v. Grave* on a bail-bond. *Barnes 99.* When proceedings staid.

The defendant was arrested the 26th of May 1747, and gave a bail-bond, but died without putting in bail above; plaintiff laid still twelve months after the arrest, and then took an assignment of and put the bail-bond in suit. The bail moved to stay proceedings, and obtained a rule to shew cause, which was now discharged; it appearing, that if defendant had put in bail in time, he lived long enough for plaintiff to have proceeded to trial, and to have had judgment and execution in his life-time. *Evening v. Spearman. Barnes 99.* When not.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in abatement, but must plead in chief. *Salk, 519.* Cannot plead in abatement, after stay on the bond.

Bail

If plaintiff hath delayed himself in proceeding to trial, the court will stay the proceedings on the bond.

Bail cannot be permitted to pay, without paying the costs against the principal, when they apply to stay.

Defendant in the original action dying before plaintiff could have judgment against him in the original action (although the bond was assigned), yet court ordered proceedings to stay.

If bail be not perfected, and plaintiff thereby loses a trial, though defendant dies, yet bond shall stand as security.

Bail having justified, the defendant moved, after the last sitting within term, to stay the proceedings on the bail-bond, upon payment of costs. The plaintiff insisted, that the action being in *Middlesex*, he had lost a trial, and that the bond ought to stand as a security; but it appearing that no declaration, *de bene esse*, had been delivered in the original action, the plaintiff had delayed himself, and rule made absolute. *Barnes* 84. *Ward, one, &c. v. Alderton.*

In debt on the bail-bond, motion to stay the proceedings, defendant having paid his principal's whole debt, and his own costs, all but 40s. which he had tendered: but the court, on considering precedents, held that the costs of the action against the principal, and the other bail, must also be paid before proceedings could be staid. 2 *Black. Rep.* 816. *Walker v. Carter.*

The original action was in *Michaelmas term*, and for want of bail, the bond was assigned in *February*. After which defendant died, and bail moved to stay proceedings, plaintiff not having got judgment on the bond before defendant's death. On hearing counsel, the court ordered proceedings to be staid on payment of costs; being of opinion, that the matter never was carried further than the bail-bond standing as a security for what should be recovered on the original trial; and if that had been the case, and defendant had died before the trial, the suit would have been at an end; the plaintiff might have proceeded more speedily; and if inconvenience happens to him, it is his own laches. *Barnes* 61. *Heath v. Afley.*

Capias ret. first of Hil. orders to perfect bail till the last day of term, taking notice of the trial for the sittings after; bail not being perfected, bond was assigned and put in suit: defendant died the 8th of *April*. The bail applied to stay proceedings on payment of costs, defendant having died before judgment.

ment. Rule discharged. Court saying, plaintiff had been delayed; if bail had been perfected he might have tried the sitting after *Hilary*: and by *stat. 17 Car. 2.* might have entered his judgment therein after defendant's death. *Morley v. Carr. Barn. 112.* If defendant becomes bankrupt and obtains his *certificate*, and *afterwards* the bond be put in suit against the bail, proceedings will be staid. *Sanders v. Spinks. Barn. 105.*

Sheriff.

Of Proceeding against the Sheriff to compel him to return the Writ, and bring in the Body of the Defendant.

I Have already stated that the plaintiff hath two remedies at his election in case the defendant should not put in his bail above in due time ; the one, by taking the bail-bond and prosecuting the sureties ; the other, by proceeding against the sheriff to compel him either to put in good bail, or satisfy the demand of the plaintiff. The first is by obtaining a rule to return the writ, and if he return *cepi corpus* ; the next is a rule to bring in the body. Neither of which can be had after plaintiff has taken an assignment of the bond ; nor where the writ was executed by a special bailiff nominated by the plaintiff or his agent. 2 *Black. Rep.* 952. If the bond be *not valid*, plaintiff may rule the sheriff. 1 *Wilf.* 223.

Neglect to return the writ.

If the sheriff neglects to return the writ and file it in due time pursuant to the rule, plaintiff may move the court on an affidavit of the service for an attachment, for he cannot have a rule to bring in the body until the writ be returned *cepi corpus*.

Sheriffs not returning process in six days after service, with a rule for that purpose, to pay the costs occasioned by the neglect.

By rule *Hil. 8 Geo. I.* it is ordered, " That from and after the last day of this present *Hilary* term, if any sheriff, under-sheriff, &c. or any of the officers or persons having the return of any process issuing out of this court, or of any precept or warrant thereupon, shall neglect or refuse to return the same *within six days after service of a rule of this court* for that purpose, such sheriffs, under-sheriffs, and every other of the above-named officers or persons, shall be liable to pay the costs occasioned by such neglect, to be taxed.

Notice

Notice is hereby given, That from and after the last day of this present term, every rule to be made for the sheriff of the county of *Middlesex*, and the sheriffs of *London*, to return writs, or bring into the court the body or bodies of any defendant or defendants, will be made for such sheriff and sheriffs to return such writs, and bring into court such body or bodies of such defendant or defendants, *within four days next after service thereof.* H. 7 Geo. 3.

Sheriffs of London and Middlesex to return writ within four days.

But with respect to country sheriffs, the rule is *still six days to return the writ, and also to bring in the body.*

Country six days.

The rule now expresses, that the sheriff shall peremptorily return the writ on notice to be given to his under-sheriff; and in town, service on Mr. *Burchal*, or Mr. *Cater*, as they act as under-sheriff of *Middlesex*, is good service: so on the person who acts as deputy to the secondaries of the *Compters* in *London*; but the rule must be served on the under-sheriff in the country, and not on the agent in town.

If a person in fact be not the under-sheriff, but yet acts as such, rule served on him will be good, and the court will grant an attachment. *Cooke's Rep.* 123. *Arne v. Neeler. Pract. Reg.* 381.

How to proceed against the Sheriff.

If the plaintiff be dissatisfied with the bail given to the sheriff, he may on the *first day of the term* obtain a rule from the secondary to return the writ; pay 4s. 6d.; serve copy on the deputy to the secondaries (if in *London*) at their office in *Grocer's Alley* in the *Poultry*; if in *Middlesex*, at the Public Office in *Took's Court, Cursitor Street*; if in the country, on the under-sheriff there; at the same time shew the original rule, as you are in this court to swear particularly to that (on which copy put your officer's name who arrested the defendant), and at the expiration of the rule, go to the *Custos Brevium*, No. 3, *Brick Court, Temple*, search for the return,

If the plaintiff be dissatisfied with the bail, he may have a rule to return the writ, and afterwards a rule to bring in the body.

A rule to return the writ may be obtained on the return day of the writ, although a rule to bring in the body cannot,

until the time is expired for defendant's putting in bail.

return, if the sheriff has returned *cepi corpus* on it, and bail is put in, in due time, first except against them, and give notice thereof (but not otherwise); then get an extract of the writ and return from the *Custos Brevium*, pay 4*d.* take same to the filacer, who will give you his rule for the sheriff to bring in the body; pay 2*s.* 11*d.*; take that to the secondary's office, and the clerk will make out a rule peremptory to bring in the body, if in *London* or *Middlesex*, within *four days*; *country*, *six days*: pay 5*s.*; serve a copy as before, and shew the original; and if the bail do not justify on the day the rule expires, or before, *viz. four days (or six) next after the service*, make an affidavit of the service of the rule; ingross same on treble sixpenny stamped paper, swear same before a judge; then give it to a serjeant, with instructions thereon indorsed, "to
" *move for an attachment against the sheriffs for not*
" *bringing in the body, pursuant to the rule an-*
" *nexed;*" fee 10*s.* 6*d.*; the form of which affidavit is as follows:

Affidavit to move for an attachment for not bringing into court the body.

John Taylor, clerk to Samuel Gill of Chancery Lane, London, Gentleman, attorney for the plaintiff in this cause, maketh oath, and saith, That he did on the day of instant, personally serve Mr. *, who acts as deputy to

the secondaries of the city of London, at their office in Grocer's Alley, in the Poultry, London, with a true copy of the rule hereto annexed, and at the same time shewed the said Mr. the

said original rule; and this deponent further saith, that no bail is put in by the said defendant, he this deponent having this morning searched with the proper filacer for that purpose.

The King's Bench have also determined, that the original must be shewn. 3 Term Rep. 351. *The King v. Smithies*, which must be stated in the affidavit.

* If in *Middlesex*, on Mr. Burcball, or Mr. Cater, who is, or acts as under-sheriff for the county of *Middlesex*.

In the evening get the rule drawn up at the secondary's for attachment; which make out yourself, as follows: pay for the rule 5s. 6d. An attachment may be moved for the last day of Term, so in the King's Bench. 3 Term Rep. 351.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the coroner of our city of London*, greeting. We command you, that you attach, esquire, and esquire, sheriffs of our said city, so that you may have them before our justices at Westminster, in fifteen days of St. Martin, to answer us of and concerning those things which on our part shall at that time be objected against them: and that you have then there this writ. Witness Sir James Eyre, Knight, at Westminster, the 6th day of November in the 34th of our reign.

him.

him.

N. B. Put the name of the cause and the words of the rule at the foot of the attachment, viz. *For not bringing into court the body of the defendant, &c.* Ingross the attachment on a 2s. 6d. stamp parchment; take it to the prothonotary's, and pay signing 1s. 4d. seal 7d.; then carry same to Mr. Shelton the coroner, Surgeons Hall, Old Bailey; pay him two guineas, and he will, on delivery of your bill of costs, at the same time get the money of the sheriffs: warrant 2s. 6d. If it is in Middlesex, take same to Mr. Hodgson, Charles Street, with bill of costs; pay him 2l. 4s. 6d. If the attachment goes against the present sheriff, it should be directed to the coroner; but if against the late sheriff, it should be directed to his successor. On the return, if he does not pay the money, you may have a rule for him to return the writ of attachment, which get of one of the secondaries, and serve him with copy. If he does not return it, make affidavit thereof, and

How to proceed on attachment,

* If in Middlesex, say, coroners of our county of Middlesex.

until the time is expired for defendant's putting in bail.

return, if the sheriff has returned *cepi corpus* on it, and bail is put in, in due time, first except against them, and give notice thereof (but not otherwise); then get an extract of the writ and return from the *Custos Brevium*, pay 4 *d.* take same to the filacer, who will give you his rule for the sheriff to bring in the body; pay 2 *s.* 11 *d.*; take that to the secondary's office, and the clerk will make out a rule peremptory to bring in the body, if in *London* or *Middlesex*, within *four days*; *country*, *six days*: pay 5 *s.*; serve a copy as before, and shew the original; and if the bail do not justify on the day the rule expires, or before, *viz. four days (or six) next after the service*, make an affidavit of the service of the rule; ingross same on treble sixpenny stamped paper, swear same before a judge; then give it to a serjeant, with instructions thereon indorsed, "to move for an attachment against the sheriffs for not bringing in the body, pursuant to the rule annexed;" fee 10 *s.* 6 *d.*; the form of which affidavit is as follows:

Affidavit to move for an attachment for not bringing into court the body.

John Taylor, clerk to *Samuel Gill* of *Chancery Lane*, *London*, Gentleman, attorney for the plaintiff in this cause, maketh oath, and saith, That he did on the day of instant, personally serve Mr. *, who acts as deputy to the secondaries of the city of *London*, at their office in *Grocer's Alley*, in the *Poultry*, *London*, with a true copy of the rule hereto annexed, and at the same time shewed the said Mr. the said original rule; and this deponent further saith, that no bail is put in by the said defendant, he this deponent having this morning searched with the proper filacer for that purpose.

The King's Bench have also determined, that the original must be shewn. 3 *Term Rep.* 351. *The King v. Smithies*, which must be stated in the affidavit.

* If in *Middlesex*, on Mr. *Burball*, or Mr. *Cater*, who is, or acts as under-sheriff for the county of *Middlesex*.

Sheriff.

In the evening get the rule drawn up at the secondary's for attachment; which make out yourself, as follows: pay for the rule 5s. 6d. An attachment may be moved for the last day of Term, so in the King's Bench. 3 Term Rep. 351.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the coroner of our city of London*, greeting. We command you, that you attach _____, esquire, and _____, esquire, sheriffs of our said city, so that you may have them before our justices at Westminster, in fifteen days of St. Martin, to answer us of and concerning those things which on our part shall at that time be objected against them: and that you have then there this writ. Witness Sir James Eyre, Knight, at Westminster, the 6th day of November in the 34th of our reign.

N. B. Put the name of the cause and the words of the rule at the foot of the attachment, viz. *For not bringing into court the body of the defendant, &c.* Ingross the attachment on a 2s. 6d. stamp parchment; take it to the prothonotary's, and pay signing 1s. 4d. seal 7d.; then carry same to Mr. Shelton the coroner, Surgeons Hall, Old Bailey; pay him two guineas, and he will, on delivery of your bill of costs, at the same time get the money of the sheriffs: warrant 2s. 6d. If it is in Middlesex, take same to Mr. Hodgson, Charles Street, with bill of costs; pay him 2l. 4s. 6d. If the attachment goes against the present sheriff, it should be directed to the coroner; but if against the late sheriff, it should be directed to his successor. On the return, if he does not pay the money, you may have a rule for him to return the writ of attachment, which get of one of the secondaries, and serve him with copy. If he does not return it, make affidavit thereof, and

him.

him.

How to proceed
on attachment,

* If in Middlesex, say, coroners of our county of Middlesex.

Sheriff.

the court will grant an attachment, and move at the same time that it be directed to *elisors*, two or more persons named for that purpose, to be approved of by the prothonotaries.

Attachment to be directed to *elisors* named by the plaintiff and approved by the prothonotary.

Motion for an attachment against the coroners for not attaching the sheriff, against whom an attachment directed to them had issued for not bringing in the body of defendant, and prayed that the same might be directed to *elisors* to be named by the prothonotary. The attachment was granted in the first instance, to be directed to *elisors* to be named by the plaintiff and approved by the prothonotary. *Andrews v. Sharp.* 2 *Black. Rep.* 911. The like case 1218. *Fitz. N. B.* 54. 62.

If no Bail be put in.

If no bail is put in, either by the sheriff or defendant, then after the rule to bring in the body is expired, make affidavit thereof in this manner :

Affidavit when bail put in, and not perfected.

I. W. clerk to *S. G.* of *Chancery Lane*, *London*, attorney for the plaintiff in this cause, maketh oath and saith, That he did, on the day of instant, personally serve Mr.

who is or acts as deputy to the secondaries of the city of *London*, with a true copy of the rule hereto annexed, at the same time shewing him the said original rule; and this deponent further saith, That bail above has been put in for the said defendant in this cause, but the same is not perfected.

If sheriff does not return writ.

If the sheriff does not return the writ pursuant to the rule after service thereof, then, upon search thereof made at the *Custos Brevium*, you make an affidavit of the service, and move the court for an attachment *for not returning the writ* pursuant to the rule, which affidavit will be as follows :

In

In the Common Pleas.

John Denn against *Richard Fenn*.

John Taylor, clerk to Mr. *A. B.* attorney for the above-named plaintiff, maketh oath and saith, That a writ of *capias ad respondendum* was regularly issued out of, and under the seal of this honourable court, returnable on the morrow of the *Ascension* last past, directed to the present sheriffs of the city of *London*; and that this deponent did, on the _____ day instant, serve Mr. _____, who is

Affidavit to move for an attachment, for not returning the writ.

or acts as deputy to the secondaries of the city of *London*, at their office in *Grocer's Alley* in the *Poultry*, *London*, with a true copy of the rule hereto annexed, and at the same time shewed him the said original rule: And this deponent further saith, That he did this morning search with the *Custos Brevium* of this court, amongst the file of writs as of this term, for the return of the said writ of *capias ad respondendum*, but that the same was not filed with the said *Custos Brevium*. Pay serjeant's fee 10s. 6d. rule 5s. 6d.; and then make out the attachment as before.

The King's Bench have held, that if the sheriff be in contempt before the defendant's death, that an attachment may issue after, though the suit be abated. *Rex v. Sheriff of Middlesex*, 3 Term Rep. 133. And have also held, that defendant may put in bail after attachment granted, provided a trial be not lost, the attachment not to stand as a security. 4 Term Rep. 352. A practice, (if the trials of bailiffs were known,) with great submission, the court would not countenance. Many bails are put in by them, in consequence of their having taken no bail-bonds, or having taken bail, who cannot stand the teste. The sheriff is an innocent man, the bonds are taken at the hazard of the officer; therefore as the sheriff is indemnified, there can be no harm in fixing the officer.

King's Bench hold, though plaintiff die, and sheriff in contempt, an attachment may issue. Also, that bail may be put in after attachment, provided a trial be not lost.

Note on this subject.

How much Sheriff and Bail are liable for.

Bail liable to
the whole debt
and costs,

Sheriff liable
as far as the
penalty of the
bond,

The practice for more than 50 years past has been, that the bail are liable to the whole extent of the *penalty of the bond* to satisfy the debt really owing to the plaintiff. Lord *Loughborough*, *Mitchell v. Gibbons*. 1 *H. Black. Rep.* 76. They are also liable to costs. *Douglas* 330. *S. Determ.*

Defendant arrested for 50*l.* and upwards, sheriff took a bail-bond penalty 100*l.* Attachment against the sheriff for not bringing in the body. Motion to set it aside on payment of 50*l.* 19*s.* together with costs. Sheriff's officer had tendered that sum and costs to the attorney, who refused to take less than 68*l.* 2*s.* 6*d.* the real debt. Lord *Loughborough*. It would be strange if the sheriff should be allowed to put himself in a better situation than the bail: the case of *Mitchell v. Gibbons* was determined on consideration. *Gould, J.* Where a party comes himself and enters into a recognizance with the bail, he is bound in double the sum, and each of the bail, in the single sum; then each is liable to the full extent: and the same rule should prevail in bail-bonds taken to the sheriff. *Wilson, J.* The sheriff may if he pleases bring in the body; he ought to put the plaintiff in the same situation as if good bail were put in and justified. Ordered the rule not to be discharged, except on payment of the whole debt and costs, with costs of the application. *Fowlds v. Mackintosh*, *H. Black. Rep.* 233.

Of proceeding against the late Sheriff.

Sheriff not liable
to be called on
six months after
he is out.

No sheriff shall be liable to be called upon to make a return of any writ or process, *unless he be required so to do within six months after the expiration of his office.* *Stat. 20 Geo. 2. c. 37. s. 2.*

Explanation.

The sheriff must be compelled by rule of court to return the writ, for a request otherwise is not sufficient

sufficient nor obligatory upon him. *Vide 2 Term Rep. K. B. 1. The King against Jones.*

A month in law is a lunar month, or twenty-eight days, unless otherwise expressed. *Doug. Rep. 446.* Month in law,

The day on which the old sheriff quits his office is to be reckoned one. So that where sheriff went out on the 12th of *February*, after four in the afternoon, (there being that year twenty-eight days only in *February*,) and was not served with the rule till the 30th of *July* following, it was held a day too late. *The King v. Adderley. Dougl. 463.* How time reckoned.

This court have granted many years the rule against the late sheriff to bring in the body instead of the distringas. *Barnes 102.* And now the court of King's Bench, who always proceeded against the late sheriff by way of distringas, have made a rule of court for that purpose. *Trin. 31 Geo. 3. Vide my Instr. Cler. K. B. 157. 5 edit.* which is a more expeditious mode of proceeding.

Care must be taken that the rules be taken out for the late sheriff to return the writ, and to bring in the body; and that the rules be served on the under-sheriff of the late sheriff, and not on the under-sheriff of the present sheriff. In *London* and *Middlesex* the offices are fixed, and the same officers continued. *Caveat.*

If the sheriff is out of office after he has taken the defendant, then you get a rule in the same manner as before from the secondary's office for him to return the writ, which if he returns *cepi corpus*, you will, on searching with the *Custos Brevium*, get a note of same, pay 4*d.*; carry it to the filacer for his rule to bring in the body, pay 2*s.* 11*d.*; then take same to the secondary's office, and get a rule peremptory to bring in the body, pay 5*s.*; serve copy thereof on the under-sheriff of the late sheriff; move for an attachment, if bail not perfected, same as before. Proceedings against the late sheriff.

Notes of Cases.

Attachment set aside for serving the rule to bring in the body on the present sheriff, instead of the late sheriff; a mere attempt to fix the sheriff.

On the 7th of November 1783, the late sheriffs of London were ruled to return the writ of *capias ad respondendum*; the late sheriffs returned the defendant taken, *whose body they had ready*. On the 13th of November a rule was served on the present sheriffs to bring in the body, which they did not; and an attachment was granted. Now, upon motion to set aside the attachment, it appeared that the old sheriffs returned the writ *cepi corpus*; and also there was returned upon the writ thus, by the new sheriffs: "*This writ, as above indorsed, was delivered to us the under-named now sheriffs, by the above-named late sheriffs, at the time of their going out of office;*" that therefore the rule ought to have been upon the *old sheriffs*, to bring in the body. Upon shewing cause, it was contended, that the new sheriffs having made the indorsement upon the writ as before stated, they had made themselves answerable for the body; but the court held, "*that the indorsement merely shewed how the writ came into the hands of the present sheriffs, and therefore set aside the attachment.*" Serjeant Grose for the plaintiff, Serjeant Bolton for the sheriffs. *Mich. Term, 24 Geo. 3. Leigh, Gent. one, &c. v. Turner.*

The sheriff may, to save himself, put in bail for defendant.

The sheriff, in order to save himself, may put in bail for the defendant (against his consent), upon receiving the rule to bring in the body; and *N. B.* The rules ought to keep pace with the defendant's time; so that the *second rule* should not be brought in before the *four days* are expired, in which the defendant has to put in his bail above, pursuant to the rule of court, and exception entered. If it were otherwise, and by any contrivance of getting an immediate return of the writ, the rule to bring in the body should expire before the time had elapsed for defendant to put in bail, the consequence would be, that after the sheriff was fixed, defendant to an action on the bail-bond might

might plead *comperuit ad diem*, and so deprive the sheriff of his remedy.

In a late case in this court between *Spicer and Linnell*, the writ was returnable in fifteen days of *Easter*: the rule to return the writ was served on *Wednesday*; the sheriff returned and filed it on the *Saturday* night; on *Monday* the plaintiff's attorney, without waiting till the defendant had put in bail (i. e. till *Monday evening*, which time he had by the rule of the court), obtained a rule to bring in the body, and served it on the sheriff on the morning of *Monday*: the defendant put in bail *Monday evening*, and notice was given; no exception was made; but the defendant not having justified *within the four days*, an attachment was moved for and obtained; and on motion to set it aside, it was held *irregular*, because bail was put in, in time, and plaintiff's attorney ought to have excepted against the bail *before he had obtained the rule to bring in the body*. *East. Term, 23 Geo. 3.* Serjeant *Grosse* for the plaintiff, Serjeant *Bolton* for the sheriffs.

Attachment set aside against the sheriff, for serving the rule to bring in the body before time expired for putting in bail above.

Another attempt to fix the sheriff.

Rule to bring in the body expired *Sat. 19 April. Monday the 21st*, defendant's bail were justified. Same day motion for an attachment for not bringing in the body. Rule why it should not be set aside with costs. On shewing cause, it appeared that the bail were justified *before the attachment was moved for*. Court referred it to the prothonotary as to the practice, who said, that though the rule for bringing in the body had expired, yet if defendant justifies his bail *before* the plaintiff moves for an attachment, the sheriff is not liable to an attachment. *Thorold v. Fisher. 1 H. Black. Rep. 9.* Rule absolute with costs. So held in *Carter v. White, Hil. 31 Geo. 3.* where the court said, they would not permit the priority of moving, to prevail against the practice.

Though rule for body is expired, yet if the defendant justifies bail before attachment moved for, it is in time.

Motion to discharge a rule to bring in the body: the defendant had put in bail, but no exception was entered in the filacer's book; notice of justification was given. Court held, That although there was

If exception to bail is not entered, although the defendant gives notice of justification and

does not, yet
sheriff is not
liable.

a waiver as between the parties, yet the irregularity was not cured, as respecting the sheriff, and therefore made the rule for discharging of the former rule absolute with costs. *Rogers v. Mapleback*. 1 *H. Black. Rep.* 107.

N. B. If the sheriff puts in bail after rule served to bring in the body, he must justify before a tender can be made, though not excepted to. *Poole v. Peate*. 2 *Black. Rep.* 1206.

If an attorney
be bail, he is
considered as no
bail, and plaintiff
may go on
against the sheriff
without except-
ing.

Motion to set aside an attachment against sheriff for not bringing in the body. The defendant had put in bail in due time, and one of the bail was his attorney; the plaintiff did not except, but proceeded against the sheriff. The court said, that as one of the bail was the defendant's attorney, they considered him as no bail, and therefore discharged the rule. *Ritchie v. Gilbert*. *E. T.* 33 *Geo.* 3.

The sheriff not
liable if proceed-
ings are not reg-
ular as a verbal
notice of excep-
tion.

Exception entered in the book and verbal notice given, afterwards defendant's attorney proceeded by giving notice to justify: the rule for bringing into court the body of defendant having expired, and no bail justified, an attachment was granted, which was set aside. *Per Cur.* Where there are two parties, and one of them takes a step to which the other ought to have taken a step, the former waives the obligation which the latter was under, as between themselves, but not as relating to a third person: here the waiver by the defendant, if it were one, was not a waiver by the sheriff. The rule ought to be strictly followed to prevent confusion. *Cohn v. Davis*. 1 *H. Black. Rep.* 80.

Sheriff, though
he goes out of
office, yet he
must bring in
the body.

In *Hil.* 1791, the sheriff of *Surry* returned *cepi corpus*, and the last day of this term was served with a rule to bring in the body. In the following vacation he went out of office, and a new sheriff appointed. In *Easter Term* bail being put in, but not justified, motion for an attachment against the late sheriff; rule granted, and afterwards made absolute, no cause being shewn. *Meekings v. Smith*, 1 *H. Black. Rep.* 629.

Monday,

Monday, 30th of April 1792, bail put in ; Wednesday an exception entered ; Monday, 7th of May, no bail being justified, the attachment issued. Rule to set it aside. Lawrence contended bail ought to have been perfected on Saturday 5th of May, the four days allowed being inclusive. Cockell insisted the attachment was too early ; the first of the four days was reckoned exclusively, and the last inclusive, and therefore that the attachment could not issue till Tuesday, May 8th, the preceding Monday being one of the four days. The court declared themselves of this opinion ; but as the bail were not in fact perfected, they could not allow the present motion, and discharged the rule with costs. North v. Evans. 2 H. Black. Rep. 36.

Four days to perfect bail is one day exclusive, and the other inclusive. The attachment did issue on the Monday irregularly ; yet as bail was not perfected, the court would not set it aside.

If defendant justifies his bail before motion for attachment, the sheriff is not liable to the attachment. 1 H. Black. Rep. 9. Thorold v. Fisher.

Common Appearance.

When defendant has been served with a copy of the *capias* or other writ, it is his duty to appear in obedience thereto. It was formerly in person, but now done by attorney. When done, both parties are in court, and the court have then the possession of the cause.

The cause of action being beneath the dignity of this court, being *1 l. 7 s. 7 d.* as appeared by plaintiff's bill delivered, and by his own acknowledgment, which was proved by affidavit, and not denied, court *staid* the proceedings. *Steer v. Holmes. 2 Black. Rep. 754.* Same practice in the King's Bench. *4 Term Rep. 496. Kennard v. Jones. 5 Term Rep. 64. Wellington v. Arters.* So in Exchequer.

If debt be beneath the jurisdiction of the court, court will stay the proceedings.

The appearance to a *capias* is entered with the Common appearance of the county wherein the writ is directed, and the

Common Appearance.

the note for the appearance is wrote on an unstamped piece of paper, in this form:

Note of appearance.

London: Appearance for *John Denn*, late of *London*, yeoman, ats. *Richard Penn*, to a *capias*, returnable on the morrow of *All Souls* (the return day of the writ).

T. P. Attorney.

This is filed with the filacer, who enters the same in a book kept for that purpose; and the memorandum or warrant, as before, must be filed on a 2s. 6d. stamp, pursuant to the statute 25 Geo. 3. c. 80.: pay him 2s. 6d. viz. 1s. 6d. for duty, and 1s. for the entry; if there be more than one defendant, pay 4d. each.

Eight days to appear.

By the *stat. 5 Geo. 2. c. 27.* Where the defendant is served with a copy of the process, he must cause a *common appearance* to be entered on the return day of the process, or within *eight days after such return.*

N. B. This means from the *return* of the *capias*, and *not* the *quarto die*; so that if the *capias* is returnable on the morrow of *All Souls*, the 3d of *November*, defendant has *all the 11th to enter his appearance.*

If defendant does not appear, plaintiff may.

And in case the defendant shall not appear *within eight days after the return* of such writ or process, the plaintiff, upon making and filing an affidavit of the *personal service* of such writ or process, may enter a *common appearance* for the defendant, and proceed thereon, as if such defendant had entered the same. *Stat. 12 Geo. 1. c. 29.*

Affidavit of service to be first made.

If the defendant does not enter his appearance *within eight days next after the return of the writ*, the plaintiff must cause the following affidavit to be made by the person who served it, which may be sworn before a judge, commissioner, filacer, or his deputy; but in town mostly before the filacer, *stat. 12 Geo. 1. c. 29.* and it is to be filed *gratis.*

When to be filed by plaintiff.

On a writ returnable the 3d of *November*, common bail must be filed the 11th, or plaintiff may file it the 12th in the morning.

By

By *Stat. 25 Geo. 3. c. 80. s. 22.* Common appearance may be filed by the plaintiff, according to the statute, without entering or filing of record a memorandum or minute for the defendant: but no solicitor shall plead or carry on any further proceedings for such defendant (if common appearance has been filed according to the statute) without filing the minute or memorandum before mentioned, under penalty of *5 l. s. 23.* If a defendant is added after commencement of an action, a memorandum not necessary. *s. 24.*

Common appearance may be filed according to statute, without a warrant.

Plaintiff cannot appear for defendant according, &c. before the 9th day in the morning; *i. e.* if process ret. the 3d of November, he may appear the 12th. *Pract. Reg. 32. Morse v. Farnham.*

When plaintiff may appear.

If defendant is sued by the wrong name, plaintiff cannot file appearance according, &c. in his right name; proceeding will be set aside. *Westall v. Finch. Barn. 406.* So in King's Bench. *Doo v. Butcher. 3 Term Rep. 611.*

If defendant sued by a wrong name, plaintiff cannot file by his right name.

If declaration be taken out of the office, it will cure the defect in the process. *Marguand v. Mayor of Boston. Barn. 416. Vide Str. 1072.*

Where the plaintiff enters an appearance according to the statute, he is not obliged to take notice of any attorney the defendant employs, *unless such attorney deliver or file a plea.* *Cooke's Rep. 116. Jones v. Wilkinson.*

In the Common Pleas.

John Denn against Richard Fenn.

John Clegg, of, &c. clerk to J. P. attorney for the above-named plaintiff, maketh oath and saith, That he did, on the 1st day of November instant, personally serve the above defendant with a true copy of a writ of capias ad respondendum, which appeared to this deponent to be regularly issued out of this honourable court, and returnable before his majesty's justices at Westminster on the morrow of All Souls; under which said copy was written an
Englisb

Affidavit to be ingrossed on a treble 6d. stamped paper.

English notice to the said defendant of the intent of such service, pursuant to the statute in that case made and provided.

Sworn, &c.

John Clegg.

Appearance
cures all defects,
&c.

An appearance by the defendant cures all errors and defects in *mesne* process. *Barnes* 163. 167. *Wade v. Wadman.* 3 *Wilf.* 141. *Lloyd v. Williams.* And he shall not afterwards take advantage of it; because the only intent of *mesne* process is to bring the defendant into court; and when he is come in, there is an end of the process. *Barn.* 163.

Though defend-
ant was named
wrong in the
writ.

If defendant be served by a wrong name, and appears by his right name, plaintiff may declare against him by his right name. *Hole v. Finch.* 3 *Wilf.* 393. So in King's Bench, *Doo v. Butcher.* 3 *Term Rep.* 611.

An appearance
entered by plain-
tiff for defendant
in a wrong name,
amended after
declaration.

The defendant in the writ and declaration was rightly named *John*, also the affidavit of service was right. An appearance according to the statute was entered by the name of *James* instead of *John*. On motion to set aside declaration, *Court said*, this is a mere slip, and the affidavit is right. So let the filacer alter the entry of the appearance, and insert the name of *John* instead of *James.* *Weston v. Packman.* 3 *Wilf.* 49.

Baron and feme.

If baron and feme are sued, the baron must appear for himself and wife, and plaintiff, although wife not served, may appear according to the statute for them. *Collins v. Shapland and ux.* *Barnes* 412.

Baron and feme joined in the writ; husband entered an appearance for himself only; plaintiff signed judgment for want of a plea, without making a demand of a plea. Motion to set it aside. Court held judgment irregular, and made rule absolute. *Clark v. Norris and ux.* 1 *H. Black. Rep.* 235.

If a wife appear without husband, the appearance is not void in law, but plaintiff cannot proceed without bringing the husband into court. *Vide* 1 *Salk.* 114.

In

If declaration be filed *in chief*, the plaintiff *must appear according to the statute before* such declaration be filed. *Barn. 242. Pract. Reg. 31.* So is the practice in K. B. *1 Term Rep. 635.*

Must appear according, &c. before declaration filed *in chief*.

If a writ be served on defendant by a *wrong name*, and he files appearance in his *right name*, he may be declared against by his *right name*; therefore, if you are aware of that mistake, stay till he appears before you file the declaration.

If writ served by wrong name, &c.

If plaintiff enters an appearance for the defendant, before the time the defendant has to enter his appearance is expired, the defendant must complain, if notice of declaration has been given, of the irregularity, before judgment signed. *Barnes 242.*

Irregularity of plaintiff's entering appearance for defendant to be complained of before judgment.

That any attorney of either Bench accepting a warrant to appear, or subscribing a process, &c. be compelled to cause appearance, or be liable to an attachment, or put out of the roll, as the case requires. *R. M. 1654. sect. 13.*

Attorney not appearing according to undertaking, to be attached.

If an attorney take upon himself to appear, the court looks no further, but proceeds as if he had sufficient authority so to do, and leaves the party to his action against him, should it be otherwise. *Salk. 87.*

If attorney undertake.

In what Cases a Common Appearance will be ordered.

An *ac-etiam* was put into the *capias*, which was indorsed for bail, but no *ac-etiam* was put on the *præcipe*; therefore common appearance ordered. *Barnes 117. Hay v. Mann.* One affidavit against several defendants upon several debts, common appearance ordered. *Barnes 70. Bett v. Goodman. Ibid. 115.* But refused in *Trinity Term 1783*; where one only was arrested, and where the action was vexatious. *2 Black. Rep. 809.* The husband absconded and could not be taken, and wife arrested on *mesne* process; she was discharged. *Blick v. Halpenn and wife. Barnes 67.*

Common appearance ordered.

Rule as to the discharge of the wife.

Per Cur. The rule is, that where there is judgment and execution against both the husband and wife, she shall not be discharged; but if they both be in custody upon *misne* process, the wife shall be discharged upon common bail. *Anon.* 3 *Wils.* 124.

Marriage must be made out.

Where the marriage is clearly made out, the court will order the feme to be discharged on common appearance. *Holland v. Erskine Barnes* 100. But when she acts as a feme sole for twelve years, it makes the matter doubtful. *Ibid.*

Defect in affidavit.

Affidavit stating defendant was indebted to plaintiff in *trover*, common appearance ordered. 1 *H. Black. Rep.* 218. *Hubbard v. Pachy.*

So on an affidavit that defendant was indebted in 500 *l.* and upwards. *Cooke v. Dobree.* 1 *H. Black. Rep.* 10. *Vide* 245. *Hibson v. Campbell.* Same book.

Gaming.

Defendant arrested on an affidavit for so much money won of him by the plaintiff, at divers plays or games called brag and toss-up, which he promised to pay. Defendant discharged on a common appearance. *Young v. Moore.* 2 *Wils.* 67.

Fugitive.

If defendant produces a duplicate of his discharge as a fugitive, he shall be discharged on a common appearance. *Barnes* 100. So if his discharge be as an insolvent debtor. *Baxter v. Overton.* *Ibid.* 102. *Vide* 105. *Norton v. Lutwidge.* Same point as a fugitive.

When a supplemental affidavit will now be received, though contrary to two former cases. *Vide* p. 137.

Affidavit to hold bail "indebted to plaintiff in *l.* and upwards," and no farther; motion for common appearance; on shewing cause, a supplemental affidavit was offered, stating it was for money lent, and plaintiff had many receipts to produce of defendant. It was opposed being received, and cited *Cooke v. Dobree.* 1 *H. Black. Rep.* 10. and 2 *Wils.* 224. *Reeks v. Groneman.* The court said, that unless there were special circumstances to prevent it, they would allow in such a case such an affidavit. Rule discharged. *Tardy v. Devaux.* *M.* 33 *Geo.* 3. The King's Bench held, that

King's Bench.

that an affidavit to hold bail must be as *strong* and *positive* as an affidavit to change the venue. 1 *Term Rep.* 716. *Mackenzie v. Mackenzie.*

Motion to discharge defendant on affidavit that defendant was married 30th of *October* 1764, to *G. F. Meadon*, at *St. Margaret's, Westminster*, with whom she has ever since cohabited, and he is generally known to be her husband, but that she was arrested last *February* for 23^l. though the cause of action (if any) arose since the coverture, and that plaintiff then knew her to be the wife of *G. F. Meadon*. A copy of the register was also produced, and a bill of exchange drawn by *G. Meadon* was also produced, which she offered to plaintiff to be changed for her on 10th of *February* 1772, the day when their dealings commenced. *Per Cur.* Where a tradesman gives credit to a woman of genteel appearance for articles of dress not much beyond her level, (as was the present case,) and he does not know her to be a married woman, nor does she inform him so, nor is her coverture of such sufficient notoriety as upon reasonable enquiry he might find it out; if in such a case he brings his action, the court will not interpose in this summary way to deliver a woman in such circumstances as contributed to impose upon the plaintiff, but will leave her to plead her coverture; though they would certainly discharge a feme covert who lived openly with her husband, however the plaintiff might pretend ignorance of it, for then it is his duty to inform himself. The plaintiff's affidavit is cautiously worded, and not so explicit as it ought to be; yet from the confusion of the *christian names* of the supposed husband, it is by no means clear to the court that she really is a feme covert; and, if she was, there was not a sufficient notoriety of it to the world so as to intitle her to her discharge in a summary way; nor is it to be conceived that if she was really the wife of a man in a genteel office, he would have let her remain in gaol from *February* last to the 23^d of *May* for 23^l. without giving bail for her: upon all

The court will not discharge a feme covert on common appearance, unless the coverture be open and notorious.

Common Appearance.

all these accounts the court do not think it necessary to interpose, but will leave her to her regular remedy. Rule discharged. *Pearson v. Meadon*. 2 *Black. Rep.* 903.

Bankrupt.

If defendant a bankrupt, produces his certificate allowed, confirmed, and inrolled, he shall be discharged. But the court will not discharge a bankrupt on common appearance, when the commission appears to have been grossly fraudulent. 2 *Black. Rep.* 725. *Sowley v. Jones*.

Security for Costs.

Formerly the practice of the two courts differed, the King's Bench holding, that a plaintiff who was a foreigner should not proceed in his action until he gave security for costs, because if a verdict should be against him, he was not within the reach of our law so as to obtain satisfaction. 1 *Term Rep. K. B.* 267. Another reason was, if an Englishman sue in a foreign court, he must give security for costs. *Ibid.* 362. *Fitzgerald v. Whitmore*. The Common Pleas refused a rule though plaintiff a foreigner, and had left *France* to avoid being arrested for debt, and was in *England* insolvent, saying, that neither the plaintiff being a foreigner, nor his insolvency in this country, were sufficient reasons to require such a security. *H. T.* 1789. *Pourier v. Carter*. 1 *H. Black. Rep.* 106.

A rule granted to stay proceedings till security given.

Nor would the Common Pleas grant a rule on the circumstances alone of plaintiff's being resident abroad, but required an affidavit of "his having gone thither to avoid payment of his debts of his insolvency in a foreign country," or the like, saying, he should not be compelled to give security merely because he was in another country. But an affidavit of this sort being now produced, a rule to shew cause was granted and made absolute, no cause being shewn. *Parquot v. Eling*. 1 *H. Black. Rep.* 106.

Now a contrary determination.

But now in *Ganesford v. Levy*, on an affidavit simply, "that the plaintiff's place of residence was

at

at Bourdeaux." Court laid down, to guide the practice in future, that where a plaintiff resided in a foreign country, and out of the reach of the process of the court, he might be called upon to give security for costs, though no other circumstances were stated in the affidavit. *Michaelmas Term, 33 Geo. 3.*

In an action against the keeper of a lottery-office, a motion was made to stay the proceedings till security was given, upon an affidavit of plaintiff's insolvency and extreme indigence. The court said, they had gone as far as they could in actions of this kind, by preventing the issue money from being paid, and ordering it to be placed into the hands of the prothonotary; that to require security, would be directly contradicting the acts which gave the penalties to whoever would sue for them, without imposing any such condition. Rule refused. *Field, qui tam, v. Garron. 2 H. Black. Rep. 27. Barn. 126.* This is the same in King's Bench. *3 Term Rep. 137.*

N. B. The application cannot be made till bail put in. So in King's Bench, *4 Term Rep. 697. De la Preuve v. The duc de Biron.*

In ejectment on demise of an infant, court will stay the proceedings till a responsible plaintiff be named, or until security be given for the costs. *Thrustout v. Percival. Barn. 183.* Same in King's Bench, *Term Rep. 1 V. 491.* So in this court if lessor of plaintiff die, *Goodright v. Scarle. Barn. 147.* So I take it where there has been a former ejectment, there you may move to stay the proceedings in the second ejectment, till the costs of the former are paid. And so in the King's Bench, *1 Term Rep. 491. Barn. 133. Salk. 255.*

This court would not stay proceedings till the debt and costs in two other actions, for which defendant had obtained judgment against plaintiff, should be paid. *Cooke v. Dobree. 1 H. Black. Rep. 10.*

Declaration.

Definition of a
declaration.

THE declaration is a legal specification of the cause of action; and if the proceeding be by *special original writ*, the plaintiff must declare for the same cause of action as is there expressed. But if the proceeding be by *common capias*, then the declaration expresses the cause of action by several counts; and it should correspond with the process, *in the names and descriptions of the parties*: for if there be a material variance, the court will set aside the proceedings; unless where the process is taken out against the defendant by a *wrong name*, and he appears by his *right name*, there the plaintiff may declare against him by the *name* in which he appears; stating, that he was arrested by the other; for by appearing, the defendant admits himself to be the person sued; and so the variance is immaterial. So in the King's Bench, 3 Term Rep. 611. *Boyne v. Mills*.

If a plea in abatement, may now amend.

If defendant plead in abatement, that he is sued by a wrong name, the plaintiff may on payment of costs have an order to amend. So determined, Hil. 32 Geo. 3. The like practice in the King's Bench, on the usual time being given to plead *de novo*.

The substantial rules of pleading are founded in strong sense and in the soundest and closest logic, and so appear when well understood and explained; though being misunderstood and misapplied, they are often made use of as instruments of chicanery. *Robinson v. Raley*. 1 Burr. 316.

It is one of the most honorable, laudable, and profitable things in our law, to have the knowledge of well pleadings in actions, *real* and *personal*. Co. Lit. 534. Vide my Instr. Clerk. K. B. 5 edit.

Repetitions to be
avoided in decla-
rations.

For avoiding of long and unnecessary repetitions of the original writ in actions upon the case, and personal

personal actions upon penal statutes. That declarations in actions of trespass on the case or personal actions upon any general statute, namely, hue and cry, monopolies, and for suits in the admiralty, and such like, other than debt, repeat not the original writ, but only the nature of the action, viz. *A. B. was attached to answer C. D. in a plea of trespass upon the case or in a plea of trespass and contempt against the form of the statute.* *Rule Mich. 1654. f. 16.*

Only the nature of the action to be repeated.

For the avoiding of the common bar and new assignment. The declaration upon an original writ or bill, *quare clausum fregit*, may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment. *Ibid. f. 17.*

Common bar.

That unnecessary length of declarations be forborne, and in order thereunto, that in actions of covenant not to repeat more of the deed than is necessary for the assignment of the breach, and not to repeat the covenant in the conclusion. *Ibid.*

Unnecessary length of declarations.

In actions of slander long preambles be forborne, and no more inducement than what is necessary for the maintenance of the action; but when it requires a special inducement, or *colloquium*. *Ibid.*

Slander.

That in actions upon general statutes, the declaration not to repeat the statute, but to conclude against the form of the statute in such case made and provided; as in case of debt upon the *Stat. 2 Ed. 6.* for tithes, and *32 H. 8.* for maintenance, *21 Jac.* of monopoly. *Ibid.*

On statutes.

That action of debt upon a judgment had in the courts at *Westminster*, to recite only the judgment; but if a judgment had by or against an executor or administrator, then the action of debt upon that judgment, to repeat the declaration and judgment. *Ibid.*

Debt on judgment.

That before the declaration actually entered, the plaintiff may amend his declaration, paying costs, or giving imparlance, at the plaintiff's election, by the order of a judge of the court. But after it is

When declaration may be amended.

Q

entered,

entered, if the amendment be but a small matter that doth not deface the roll, yet that before issue or demurrer entered it be amendable by rule of court upon costs, and liberty to plead, with a new or further imparlance. *Ibid.*

Rules of pleading objects of precision and brevity.

As the rules of pleading are founded in good sense, their objects are *precision* and brevity. Nothing is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his ground of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover. If he states what is impertinent, it is an injury to the other party, and may be struck out, and costs allowed upon motion. As where a declaration for a surgeon's demand, and in every count it was laid to be for curing the defendant of the foul disease, the court expressed great displeasure that such language was used, and intimated their desire that whenever the like scandal is inserted, that somebody would move to strike out the words, and to refer it for scandal and impertinence, and that they should direct the prothonotary to tax exemplary costs; that the rule for referring scandal ought to be the same at law as in equity; and that they remembered 350*l.* costs taxed in chancery for scandal. 2 *Wilson* 20. *Anon.*

Impertinence.

If unnecessary counts be not struck out before trial, and plaintiff recovers on one, he will be intitled to the costs of the whole declaration. 2 *Black. Rep.* 800. 1199.

Motion to refer a declaration to the prothonotary, to strike out superfluous and unnecessary parts of it. It was insisted, that defendant had come too late, and had waived his objection by taking the declaration out of the office, and pleaded before the motion. The rule was made absolute; and Lord Loughborough said, "in my opinion it would not be too late after verdict." *Law v. Williamson.* Hil. 31 Geo. 3. In the King's Bench the rule is, if plaintiff do recover on one count only, he shall have
no

no costs of the others. *Say. 212. 3 Burr. 1232; nor is defendant intitled to any.*

A declaration containing five counts reduced into two. *Bownas v. Wilcock. Barnes 360.*

Variance between the declaration and process, *i. e.* to answer the plaintiff *qui tam pro dom. rege pro seipso sequitur*, and the declaration in his own right, is fatal. *Canning v. Davis. 4 Burr. 427.* cited in *2 Black. Rep. 722. Lloyd v. Williams.* But where the process is to answer to *John Lloyd* only, and the plaintiff declares in an action *qui tam*, the court held this well enough. *Lloyd v. Williams. 3 Wils. 141. Vide 2 Str. 1232.*

Variance between process and declaration, when fatal.

If the plaintiff declare in debt, on process with *ac-etiam in case*, it is a waiver of the bail. *3 Wils. 141. Lloyd v. Williams.*

But it is not a ground to enter an *exoneretur*, if the sum sworn to is under 40*l.* as it seems the *ac-etiam* is not necessary, by *13 Car. 2. Stat. 2. c. 2* under 40*l.* *Pract. Reg. 137. Lockwood v. Hill. 1 H. Black. Rep. 310.*

It is reasonable in all cases, that the plaintiff should give to the defendant an account of the particulars of his demand, and the court or a judge may stay proceedings till it is done. Plaintiff's demand.

So in King's Bench, *3 Burr. 1390, Le Briton v. Braham*, done by summons in both courts. *Mr. J. Buller* reprobated a motion of this sort.

Where an arrest shall be by virtue of a *capias ad respond.* in any county, and bail be put in, and plaintiff shall think proper to declare in a different county, it shall not be deemed a waiver of the bail. *R. H. T. 22 Geo. 3. Vide this rule at length, title Process.* When no waiver of bail.

Ordered, that all declarations and pleadings shall be delivered, all such demands made, and all notices given, before nine in the evening. *R. E. T. 10 Geo. 2.* Delivery as to time of pleading.

No action, &c. shall be staid, nor any judgment, sentence, &c. reversed, by reason of omission or defect in the entering or filing of record the memorandum. Actions are to proceed though no warrant or memorandum filed.

Declaration.

randum or minute directed, but the court shall proceed the same as if such memorandum or minute was entered or filed. *Stat. 25 Geo. 3. c. 80. s. 17.*

How to be ingrossed, and to charge.

When the declaration is drawn, it is to be ingrossed on treble penny stamp paper; charge on the back thereof *4 d. per sheet* (seventy-two words), and duty *3 d.*; warrant, in *debt, trespass, and detinue, 4 d.*; in other actions, *8 d.*; and if the plaintiff's attorney enters appearance, according to the statute, *5 s. 10 d. more.*

Two ways to declare.

There are two ways in which the plaintiff may declare. The one on the *return day* of the writ, which is termed *de bene esse*, or conditionally, until special or common bail be filed. The other in *chief*, which is when the defendant has appeared, or where plaintiff has entered an appearance according to the statute for him: in the latter case the notice to plead is without condition within the time limited. But the better way is to file it *de bene esse*, as it speeds the cause.

If a declaration is filed *in chief*, the plaintiff must see that the defendant has appeared, or that he enter it according to the statute, before declaration is filed. *Matthews v. Stone. Barnes 242. Pract. Reg. 31.* The practice in *K. B.* is the same. *Term Rep. 1 V. 635. Cook v. Raven.*

Of the declaring *de bene esse*.

Of declaring *de bene esse*.

Upon process returnable the *first, second, or third return* of any term, the declaration may be delivered *de bene esse*, at the return of the process, with notice to plead, if in *London or Middlesex* (and defendant lives within twenty miles of *London*) in *four days*. But if the plaintiff declares in any *other county*, then it may be delivered *de bene esse*, with notice to plead within *eight days* after declaration delivered, either where there is *special or common bail filed*. *R. Trin. 8 Geo. 3.*

Where

Where special Bail or common Appearance entered.

If the defendant's attorney has appeared, or put in bail, the declaration must be delivered to him, whereupon he must pay for the same duty and warrant; or on refusal by him, or his clerk in his absence (or if his abode be unknown), it may be filed in the prothonotaries office, on payment of 2 s. a count, or 8 d. per sheet; and then on notice thereof to the defendant or his attorney (and from the time of giving said notice, and not before, the declaration is well delivered), and on rule to plead being given, judgment for want of plea may be signed; and no plea may be received till the declaration is taken out of the office. *R. T. 12 W. 3.*

When defendant files bail, or appears.

Of declaring when Plaintiff enters Appearance.

In all cases where a copy of the process of this court is served upon any defendant or defendants by the plaintiff's attorney, pursuant to the act for preventing frivolous and vexatious arrests, the plaintiff's attorney, in such case, shall leave a copy of the declaration in the office, and likewise give notice thereof to the defendant or defendants, by delivering an *English notice*, written in a secretary hand, to such defendant or defendants, or by leaving the same at the last, or most usual place of abode of such defendant or defendants, signifying the nature of the action, at whose suit it is prosecuted, and in whose office such declaration is left. And in case such defendant or defendants, after such notice given, do not plead by the time the rules for pleading are out, the plaintiff in such case may sign his judgment (a rule to plead being first given), without any other or further calling for a plea; and thereon give notice of executing his writ of inquiry, either by delivering notice in writing to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be sufficient

Where plaintiff appears for defendant, the declaration shall be left in the office, and notice given.

After such notice, the declaration shall be deemed well delivered; and if defendant does not plead in time, judgment may be signed, and notice of inquiry may be given.

Declaration.

notice to such defendant or defendants, of the time of executing such writ of inquiry. *R. Mich. 1 Geo. 2.*

Service after return bad; but if he take declaration out of the office, good.

The service of a writ after the return day is bad. But if defendant take the declaration out of the office, he waives all irregularity of process. *Whale v. Fuller. 1 H. Black. Rep. 222.*

On Process, returnable on any other Return.

If the process be returnable on *any other return* than the first, second, or third return, the defendant is then entitled to an imparlance; and in such case, notice must be given for the defendant to plead within the first *four days of the next term.*

If the action beailable, and not perfected, you must declare in this case *de bene esse* or conditionally, otherwise you will lose the bail.

Where process is last ret. a declaration *de bene esse* may be filed, with notice to plead within the four first days of the next term.

The plaintiff 23^d June, being the last day of *Trinity Term* 1790, filed a declaration *de bene esse* until an appearance entered on a bail-bond, and notice given to plead within the first four days of *Michaelmas Term*. No appearance being entered on the 26th October following, plaintiff entered one according to the *Stat.* gave rule to plead the first day of *Michaelmas Term*, 6th November, and on the 10th signed judgment for want of a plea. The court held the proceedings to be regular. *Abbey v. Martin. 1 H. Black. Rep. 533.*

If a declaration be delivered in the *second term* after the *return of process*, the defendant is intitled to an imparlance; and the notice must be to plead within the *first four days of the next term.*

Notes of Cases.

If declaration delivered *de bene esse* on or before appearance day, he has four days to plead after that day.

If a declaration be delivered *de bene esse* on or before the appearance day of the return of the writ, the defendant is intitled to *four days* time to plead from the appearance day; if delivered after the appearance day, then to four days after the delivery. *2 Black. Rep. 1243. Town cause.*

The

The delivery of a declaration before special bail is put in, is a waiver of the bail, unless it be marked *de bene esse*; and the demand of a plea is a waiver of the exception to bail, for it is admitting the defendant to be in court and in a condition to plead. *Lifter v. Wainhouse. Barnes* 92.

What is a waiver of bail.

If a declaration be filed or delivered *de bene esse*, a rule to plead may be given the same day, but such a rule cannot be entered until the first day of the term. *Seller v. Faceby. Cooke's Rep.* 68.

Rule to plead.

Formerly on a writ with *ac-etiam*, if the plaintiff declared in any other county than that in which the writ issued, he lost his bail: but now it is otherwise, by rule, *Hil. Term, 22 Geo. 3. Vide title Process.*

May now declare in any county.

On the tenth of *November*, defendant was served with a writ returnable the twelfth; it was held that the plaintiff ought not to be paid for the declaration until the fifteenth, for the four days of grace are always allowed to defendant to make an end of the cause by payment or otherwise. *2 Black. Rep.* 749. *Golding v. Grace.*

When entitled to be paid for declaration.

The plaintiff in his own right arrested the defendant upon a *capias* with *ac-etiam*, to answer him in his own right; whereupon the defendant's attorney applied to the plaintiff's attorney, and undertook to put in special bail, which he did. The plaintiff declared as executor, and not in his own right. Motion that the bail might be vacated, and common appearance accepted, which was ordered, and that plaintiff might then proceed as executor. *Hale v. Tipping. 3 Wils.* 61.

Plaintiff shall lose his bail, if he declares differently from the writ.

A declaration delivered in the country to an attorney appearing for the defendant, is not good; but it should have been delivered to the agent in town. *Adderley v. Dixie. Cooke's Rep.* 101.

Must be delivered to the agent.

It is the course of the court, that the plaintiff may at any time before the end of the second term have leave to amend his declaration by adding new counts, but not afterwards. *Green v. Bell. Cooke's Rep.* 131. *R. M.* 1654. S. 7.

May add a new count before the end of second term.

Notice to plead
after declaration
delivered, held
good.

A declaration without notice to plead, was delivered to the defendant; and some time afterwards a notice in writing was given to the defendant to plead within eight days (he living above forty miles from London): this was held to be a good declaration and a good notice to plead, although it was not given at the time of the delivery of, or written on the back of the declaration. *Anon. 2 Wils. 137.*

Declaration
should be marked
de bene esse.

Declaration was filed, but not marked on it *de bene esse*, and judgment was signed; held irregular. *Evans v. Tillam. Barnes 257. N. B.* This was where bail was required.

Cannot deliver a
declaration
against one of
two defendants.

A declaration cannot be delivered against one of two defendants until both appear, or one appears and the other is outlawed. *2 Black. Rep. 759. Knight v. Parker and another.*

How to proceed
where one is ar-
rested and the
other not.

If one defendant puts in bail and the other be not arrested, before you can declare, you must proceed to an outlawry against the other: in such case, remember on the last day of the second term to get a rule for time to declare, as plaintiff before the other defendant be outlawed, will be out of court; and you must inform the secondary of this, as the rule is out of the common form.

Of declaring by the by.

Declaration by
the by.

In this court, no person can deliver a declaration by the by, but the plaintiff; whether the defendant enters a common appearance himself, or it is done for him by the plaintiff; and if the plaintiff declares by the by against such defendant, he must do it *the same term in which the writ is returnable.* *Barnes 346. Dunn v. Hutt.*

King's Bench.

In the King's Bench the practice is, the same plaintiff may deliver declaration *before the end of the next term after the return of process.* *N. on R. M. T. 10 Geo. 2. K. B.;* and any other plaintiff may deliver a declaration in the *same term writ is returnable.* *4 Burr. 2180. Sulyard v. Harris.*

If an action be brought by baron only, and a declaration be delivered in that action, he cannot deliver a declaration by the by at the suit of himself and wife, there being no process to warrant it. *Reeks and Wife v. Robins. Barnes 337.* But if the writ be at the suit of himself and feme, he may deliver a declaration by the by at the suit of himself. *Ibid. Cooke's Rep. 131. S. C.*

If action be brought by baron only, he cannot deliver a declaration by the by, at the suit of himself and wife.

On a *capias* with an *ac-etiam*, at the suit of an executor, plaintiff cannot deliver a declaration by the by at the suit of himself; but if the writ be a general *quare clausum fregit*, plaintiff may deliver a declaration by the by, because now the variance is not held to be fatal, as if the writ be general, and the count as executor, or *qui tam*, or as assignee of the sheriff. *Hainey v. Sparing. C. B. E. 10 Geo. 3. Vide Str. 1232.* Where such a variance was, the court held the plaintiff might proceed in his action, though he lost his bail. So in *Lloyd, qui tam, v. Williams, M. 11 Geo. 3. C. B.* The writ was a general *capias*, and the declaration *qui tam*, and held well. *2 Black. Rep. 722. 3 Wilf. 141. S. C.*

When declaration cannot be delivered by the by.

A *capias* absolute, and a declaration *qui tam* well enough.

Held that the defendant's attorney is bound to receive declarations by the by, after a declaration delivered in the action on which the defendant was arrested, but is not bound to receive a declaration at the suit of any other person. *Methuin v. Pople. Cooke's Rep. 6.*

Defendant bound to receive a declaration by the by, ats. of same plaintiff.

It was alledged, on motion to set aside the proceedings, that they ought not to declare by the by till the plaintiff had declared in the original action. *Cur.* If the writ had been special it must have been so, but here the writ is an *ac-etiam* only, and so the plaintiffs by declaring will only lose the bail, but may declare in any action or county as they might upon a *clausum fregit*, and deliver as many declarations the same term between the same parties as they will. *Holmes v. Small. Cooke's Rep. 58.*

If writ be special, may not declare by the by till declaration in the original action.

How

Declaration.

How to indorse the Declaration.

You generally indorse the declaration, if delivered or filed, thus, after naming the cause, and the money to be paid for the copy and duty.

De bene esse
where bail is
required.

This declaration is filed (or delivered, as the case may be) conditionally until bail above is put in and perfected; and the defendant is to plead hereto in four days*, otherwise judgment.

On service of
process.

This declaration is filed (or delivered) conditionally (until an appearance is entered), and the defendant is to plead hereto in four days.

If delivered in
chief.

The defendant is to plead hereto in four (or eight days, as the case is) otherwise judgment.

If the action re-
quires bail, no
notice necessary.

The general practice of this court is, that if the action be bailable you may file the declaration *de bene esse*, without giving notice to the defendant. *Simmons v. Shannon.* 2 Black. Rep. 725. contra *K. B. R. T.* 2 Geo. 2.

Notices of Declaration.

What is requisite
in notice of de-
claration.

In all notices of declaration care is to be taken that the *cause* be properly named, as well as the *court* in which the suit is instituted; and in notices of declaration, the *nature of the action* is to be expressed, and *at whose suit prosecuted*, and *the time limited to plead* to such declaration; to be directed to the defendant.

John Denn, Plaintiff,

In the Common Pleas.

and

Richard Fenn, Defendant.

On bailable pro-
cess additionally.

Take notice, that a declaration was this day filed with the prothonotaries, at their office in *Tanfield Court*, in the *Temple, London*, conditionally, (until special bail is put in and perfected,) as of this present *Michaelmas Term*, against you, at the suit of the above-mentioned plaintiff, in an action of trespass on the case, on several promises, wherein the

* Country causes eight days, or if defendant lives above twenty miles.

plaintiff

plaintiff lays his damage to ten pounds ; and unless you plead thereto in four days * from the date hereof, judgment will be signed against you by default. Dated the 6th day of *November* 1793.

Yours, &c.

To Mr. C. D. the above
Defendant.

R. S. Attorney for
Plaintiff.

Take notice, that a declaration was this day filed with the prothonotaries, at their office in *Tanfield Court*, in the *Temple, London*, conditionally (until a common appearance is entered), as of this present *Michaelmas* Term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case, on several promises, wherein the plaintiff lays his damage to ten pounds ; and unless you plead thereto, in four days * from the date hereof, judgment will be signed against you by default. Dated the 6th day of *November* 1793.

The like upon
common process.

Take notice, that a declaration was this day filed with the prothonotaries, at their office in *Tanfield Court*, in the *Temple, London*, as of this present *Michaelmas* Term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case, on several promises, wherein the plaintiff lays his damage to ten pounds ; and unless you plead thereto in four days * from the date hereof, judgment will be signed against you by default. Dated the 12th day of *November* 1793.

The like upon
common process,
where bail or
appearance is
according to the
statute.

This notice will do where bail is perfected, or by the by ; only say (*filed by the by*).

Nonpros for want of declaring.

That upon appearance to be entered in the term wherein the writ, bill, or process is returnable, unless the plaintiff in any suit, writ, &c. shall put into the court from whence such writ, &c. did issue,

Nonpros may be entered if no declaration after end of second term ; if defendant appears in the term, writ is returnable.

* If in the country, eight days.

his

his bill or declaration against the person so arrested, in some personal action or *ejectione firmæ* of lands or tenements, before the end of the term next following after appearance, that then a nonsuit for want of a declaration may be entered against the said plaintiff: and the defendant in every such writ, &c. shall or may have judgment to recover costs. Stat. 13 Car. 2. Stat. 2. c. 2. s. 2.

Within what time the plaintiff must declare.

That upon all process returnable the first or any other return in any term, the plaintiff shall have liberty to the end of the next ensuing term, to deliver his declaration to the defendant's attorney, or of leaving the same in the office; and the defendant's attorney having entered his appearance with the proper officer, as of that term in which the process is returnable; and at the end of the ensuing term, or in four days after the end thereof, having given a rule to declare in the proper office, and having called on the plaintiff's attorney or clerk in court (if he can be found), the defendant any time in the vacation of such ensuing term, after the rule for declaring is out, may sign his nonpros for want of a declaration, and not afterwards; and the plaintiff shall not, without leave of the court, have any longer time to declare in than as above said, other than the time to be limited by the defendant's rule; any rule or practice to the contrary hereof notwithstanding. R. Hil. 9 Ann.

Cannot sign nonpros, unless appearance entered.

The defendant cannot sign a nonpros unless he enters his appearance within the term the writ is returnable. So in both courts; vide 2 Term Rep. 719. K. B. Cas. Temp. Hard. 138.

Joint action.

In a joint action, there cannot be separate nonprosses, Dougl. 169.; but where two defendants are sued in one writ, and separate appearances, if the plaintiff declare against one separately, and not the other, the latter may sign a nonpros: so if it can be made appear that the action is not a joint one. Same in King's Bench, 2 Term Rep. 257, 258. A rule in this court must be given within four days exclusive

exclusive (after the last day of the term) of the one day, and *inclusive* of the other.

If the plaintiff, on the last day of the *second term*, wants further time to declare, he may, by applying to the secondaries, have a rule for that purpose, upon paying 4 s.; serve defendant's attorney with a copy, and shew the original, or stick a copy up in the prothonotary's office, if he does not appear; but if a rule is given by the defendant to declare, then, if the plaintiff wants further time, he may apply to one of the judges for a summons; serve copy on defendant's attorney, and attend the judge thereon, who will, if he sees reason, grant an order to the first day of the next term inclusive.

When plaintiff may apply for further time to declare.

On a rule given to declare, a declaration was demanded of the attorney in the country, by his own agreement; but the *nonpros* signed for want of a declaration, was held to be irregular; for the declaration should have been demanded in town. No agreement of country attornies can vary the practice of the court: all transactions of this kind must be in town. *Barnes* 311. *Ellwood v. Ellwood*. *Pract. Reg.* 124. *S. C.*

A declaration must be demanded of the agent in town.

Where the defendant, at the end of the *second term*, does not give a rule for the plaintiff to declare, the plaintiff has till the *essoin day of the third term* to deliver or file his declaration. *Pract. Reg. C. P.* 121. *Steward v. Harding*. *Cooke's Rep.* 13. *S. C.*

If no rule to declare be given, plaintiff has till the essoin day of the next term.

Mr. Justice Buller said, in the King's Bench—By the general rule of law, a plaintiff must declare *within twelve months after the return of the writ*. But by the rules of the court of King's Bench, if he do not deliver his declaration *within two terms*, the defendant may sign a nonpros. Though unless he take such advantage of the neglect, the plaintiff may still deliver a declaration within a year. *Oily v. Lee*. 2 *Term Rep.* 112. 3 *Term Rep.* 123. *Vide* 12 *Mod.* 217. *contra*, not bound to receive a declaration after two terms; and so it always was understood to be the practice previous to the above

King's Bench practice.

new

new determination. *N. on R. M. 10 Geo. 2. K. B.* But if proceeding be in King's Bench by original, a nonpros may be signed without giving a rule to declare before *effoign day of the third term*, if appearance entered properly.

Where the plaintiff does not declare, after having obtained time, the defendant may sign judgment of nonpros without giving a rule.

In *Michaelmas vac. 1787*, a *capias* was issued, returnable on the *oct. of St. Hil.* to which the defendant appeared. On the last day of *Easter term*, the plaintiff obtained a rule for time to declare until the first day of *Trinity term*, and then a rule for further time till the *last day of Trinity term*; but not having declared in that term, the defendant in the vacation, signed judgment of *nonpros*. Rule to set it aside. *Cur.* The plaintiff having obtained time to declare, has no right to call upon the defendant for notice: where time to plead has been given, no rule to plead is necessary; and the case of declaring, bears, in this respect, a strict analogy to that of pleading. Rule discharged. *Towers v. Powel and ux. 1 H. Black. Rep. 87.*

Of intitling and laying the Day in the Declaration.

It is usual when the cause of action will admit of it, to intitle the declaration *generally* of the term in which the writ is returnable: but it should always be intitled *after* the time when the cause of action is stated to have accrued: therefore where the cause of action is stated to have accrued *after* the first day of the *term* in which the *writ is returnable*, the declaration should be intitled of a *subsequent day in that term*, and not of the term generally: for a *general title* refers to the *first day of the term*; and upon such a title, it would appear that the action was commenced before the cause of it accrued. Yet when the cause of action was stated to have accrued on the *first day of the term*, the court on demurrer held, that the declaration might be intitled of the term generally, for the delivery of the declaration is the act of the party; and in antient times it could not have been delivered till

the sitting of the court ; so that the cause of action might well have accrued before the actual delivery of the declaration. *Vide 1 Term Rep. K. B. 116. 2 Lev. 176.*

The defendant has a right to call upon the plaintiff to intitle his declaration agreeable to the true time of delivering it to the defendant. *1 Wils. 304.*

It ought to be intitled of the term in which the writ is returnable ; and if not, to prevent a further claim, the defendant may obtain an order. *Vide 3 Term Rep. K. B. 624. 1 Str. 638. 1 Wils. 39.*

Ought to be intitled term writ returnable.

If cause of action arises within the term, make a special day after the cause of action accrued ; as *Thursday next after the morrow of All Souls in Michaelmas Term in the thirty-fourth year of the reign of King George the Third*, instead of the term generally.

If action arises in term.

If the plaintiff declares on a *note or bill of exchange*, the day is *material*, and an essential part of the agreement from which he cannot vary ; so on a *bond or other writing* ; but in the case of a common *assumpsit*, the day is alledged only for form, and therefore the defendant cannot confine the plaintiff to the day alledged. *Str. 21. Co. Lit. 283. Plow. Com. 24. a.*

If on note, or bill, or writing, day material ; so on bond.

In other cases, as *trespass, assault, battery, &c.* the day is *immaterial*, but is in general laid after the cause of action accrued, and before the term or time of which the declaration is intitled. *Vide 1 Wils. 171.* A declaration on *scire fac.* returnable last return of the term, may be intitled of the same term generally. *3 Wils. 154. Ward v. Gansell.* The court considered the *whole term* as one day in this case.

In trespass, &c. not material.

Declarations in Assumpsit.

In the Common Pleas.

*Michaelmas Term, in the 34th year of the reign of
king George the third.*

*Indebitatus
assumpsit for
work and labour,
and for mate-
rials found.*

*Day not mate-
rial; any time
before writ sued
out.*

*Quantum meruit
thereon.*

LONDON, (ff.) *A. B.* late of *London*, yeoman, was attached to answer *C. D.* in a plea of trespass on the case; and whereupon the said *C. D.* by *E. F.* his attorney, complains, *For that whereas* the said *A. B.* on the 1st day of *November* in the year of our Lord 1793, to wit, at *London* aforesaid, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, was indebted to the said *C. D.* in 20*l.* of lawful money of *Great Britain*, for the work and labour, care and diligence, of the said *C. D.* by the said *C. D.* before that time done, performed, and bestowed, in and about the business of the said *A. B.* and for the said *A. B.* and at his special instance and request; and for divers materials, and other necessary things, found, provided, used, and applied by the said *C. D.* for the said *A. B.* in and about that work, at his like request. And being so indebted, he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *C. D.* to pay him the said sum of money when he should be thereto afterwards requested. *And whereas* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *C. D.* at the like special instance and request of the said *A. B.* had before that time done, performed, and bestowed other his work and labour, care and diligence, in and about other the business of the said *A. B.* and for the said *A. B.*

A. B. and had before that time, at the like special instance and request of the said *A. B.* found, provided, used, and applied divers other materials, and other necessary things, in and about that work; he the said *A. B.* then and there undertook, and faithfully promised the said *C. D.* to pay him so much money as he therefore reasonably deserved to have when he should be thereto afterwards requested. And the said *C. D.* avers, That he therefore reasonably deserved to have of the said *A. B.* other 20 *l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *A. B.* afterwards, to wit, on the same day and year aforesaid, there had notice. And whereas the said *A. B.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *C. D.* in other 20 *l.* of like lawful money, for the work and labor, care and diligence, of the said *C. D.* by him the said *C. D.* before that time done, performed, and bestowed, in and about other the business of the said *A. B.* and for the said *A. B.* and at his special instance and request; he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *C. D.* to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested. And whereas afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *C. D.* at the like special instance and request of the said *A. B.* had, before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *A. B.* and for the said *A. B.* he the said *A. B.* then and there undertook, and faithfully promised the said *C. D.* to pay him so much money, as he therefore reasonably deserved to have, when he the said *A. B.* should be thereto afterwards requested. And

*Indebitatus
assumpsit* for
work and la-
bour generally.

Quantum meruit
thereon.

R

the

For goods sold
and delivered.

Quantum meruit.

Money lent.

the said *C. D.* avers, that he therefore reasonably deserved to have of the said *A. B.* other 20*l.* of like lawful money, to wit, at *London* aforesaid, in, &c. whereof the said *A. B.* afterwards, to wit, on the same day and year aforesaid, there had notice. *And whereas* the said *A. B.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. was indebted to the said *C. D.* in other 20*l.* of like lawful money, for divers goods, wares, and merchandizes, by the said *C. D.* before that time sold and delivered to the said *A. B.* and at his special instance and request; and, being so indebted, he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook and faithfully promised the said *C. D.* to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested. *And whereas* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. in consideration that the said *C. D.* at the like request of the said *A. B.* had, before that time, sold and delivered to the said *A. B.* divers other goods, wares, and merchandizes; he the said *A. B.* then and there undertook, and faithfully promised the said *C. D.* to pay him so much money as he therefore reasonably deserved to have, when he the said *A. B.* should be thereto afterwards requested; and the said *C. D.* avers, that he therefore reasonably deserved to have of the said *A. B.* other 20*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid; whereof the said *A. B.* afterwards, to wit, on the same day and year aforesaid there had notice. *And whereas* the said *A. B.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *C. D.* in other 20*l.* of like lawful money, for money by the said *C. D.* before that time lent and advanced to the said *A. B.* and at his special instance and request; and, being so indebted,

indebted, he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. undertook and faithfully promised the said *C. D.* to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested. *And whereas* the said *A. B.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. was indebted to the said *C. D.* in other 20*l.* of like lawful money, for money by the said *C. D.* before that time laid out, expended, and paid for the said *A. B.* and at his special instance and request; and being so indebted, he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook and faithfully promised the said *C. D.* to pay him the said last mentioned sum of money, when he should be thereto afterwards requested. *And whereas* the said *A. B.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *C. D.* in other 20*l.* of like lawful money, for money by the said *A. B.* before that time had and received, to and for the use of the said *C. D.*; and being so indebted, he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook and faithfully promised the said *C. D.* to pay him the said last mentioned sum of money, when he should be thereto afterwards requested. *And whereas* the said *A. B.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *C. D.* of and concerning divers other sums of money, before that time due and owing from the said *A. B.* to the said *C. D.* and then being in arrear and unpaid; and upon that account the said *A. B.* was then and there found in arrear and indebted to the said *C. D.* in a large sum of money, to wit, in the further sum

Money laid out, and

Money had and received.

Insimul computasset.

Conclusion.

of 20*l.* of like lawful money : and being so found in arrear and indebted to the said *C. D.* he the said *A. B.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *C. D.* to pay him the said last mentioned sum of money, when he should be thereto afterwards requested. Yet the said *A. B.* not regarding his said several promises and undertakings, so by him made in this behalf as aforesaid, but contriving, and fraudulently intending, craftily and subtilly, to deceive and defraud the said *C. D.* in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said *C. D.* (although so to do he the said *A. B.* was requested by the said *C. D.* afterwards, to wit, on the same day and year aforesaid, and often afterwards, to wit, at *London* aforesaid, in the parish and ward aforesaid), but he to do this hath hitherto wholly refused, and still refuses ; wherefore the said *C. D.* says he is injured, and hath sustained damage to the value of 20*l.* and therefore he brings his suit, &c.

For the sale of
horses.

Middlesex } *Richard Roe*, late of *Westminster*, in
to wit. } the said county, yeoman, was attached
to answer *John Doe*, in a plea of trespass on the
case ; and whereupon the said *John* by *R. L.* his
attorney, complains, *For that whereas* the said
Richard, on the first day of *November*, in the year
of our Lord 1793, to wit, at *Westminster*, in the
said county, was indebted to the said *John* in 20*l.*
of lawful money of *Great Britain*, for divers horses,
mares, and geldings, of the said *John* by him the
said *John* before that time sold and delivered to the
said *Richard*, at his special instance and request ;
and being so indebted, he the said *Richard*, in con-
sideration thereof, afterwards, to wit, on the same
day and year aforesaid, at *Westminster* aforesaid,
undertook, and then and there faithfully promised
the said *John* to pay him the said sum of money,
when he should be thereto afterwards requested.

And whereas afterwards, to wit, on the same day *Qu. val. thereon.* and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like special instance and request of the said *Richard*, had before that time sold and delivered to him the said *Richard* divers other horses, mares, and geldings, of him the said *John*, he the said *Richard* undertook, and then and there faithfully promised the said *John*, to pay him so much money as the said horses, mares, and geldings, at the time of the sale and delivery thereof, were reasonably worth, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that the said horses, mares, and geldings, at the time of the sale and delivery thereof, were reasonably worth other 20*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the day and year aforesaid, there had notice. *Add a count for money paid, and common conclusion.*

Oxfordshire, (ff.) A. E. late of *Chipping Norton*, in the said county, widow, executrix of the last will and testament of *T. E.* her late husband deceased, was attached to answer *A. S.* widow, of a plea of trespass on the case; and whereupon the said *A. S.* by *J. F.* her attorney, complains, *For that whereas* the said *T. E.* in his life-time, to wit, on the first day of *October*, in the year of our Lord 1792, to wit, at *Witney* in the said county, was indebted to the said *A. S.* in 20*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandizes, by the said *A. S.* before that time sold and delivered to the said *T. E.* in his life-time, at his special instance and request; and being so indebted, he the said *T. E.* in his life time, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook and faithfully promised the said *A. S.* to pay her the said sum of money, when he should be thereto afterwards requested. *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the

Declaration
against an exe-
cutrix for goods
sold and deliver-
ed to her testa-
tor.

Money laid out.

Common conclusion.

county aforesaid, in consideration that the said *A. S.* at the like special instance and request of the said *T. E.* in his life-time, had, before that time, sold and delivered to the said *T. E.* in his life-time, divers other goods, wares, and merchandizes, he, the said *T. E.* in his life-time, then and there undertook and faithfully promised the said *A. S.* to pay her so much money as she therefore reasonably deserved to have, when he should be thereto afterwards requested. And the said *A. S.* avers, that she therefore reasonably deserved to have of the said *T. E.* in his life-time, other 20 *l.* of like lawful money, to wit, at *Witney* aforesaid, in the county aforesaid, whereof the said *T. E.* in his life-time, afterwards, to wit, on the same day and year aforesaid, there had notice. *And whereas* the said *T. E.* in his life-time, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, was indebted to the said *A. S.* in other 20 *l.* of like lawful money, for money by the said *A. S.* before that time laid out, expended, and paid for the said *T. E.* in his life-time, and at his special instance and request; and, being so indebted, he the said *T. E.* in his life-time, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook and faithfully promised the said *A. S.* to pay her the said last-mentioned sum of money, when he should be thereto afterwards requested. Yet the said *T. E.* in his life-time, and the said *A. E.* executrix as aforesaid, since his death, not regarding the said several promises and undertakings, so by the said *T. E.* in his life-time, made in this behalf as aforesaid; but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the said *A. S.* in this respect, have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *A. S.* (although so to do, he the said *T. E.* in his life-time, was requested by the said *A. S.* and the said *A. E.* executrix as aforesaid, since

since the death of the said *T. E.* afterwards, to wit, on the first day of *December*, in the year aforesaid, and often afterwards, to wit, at *Witney* aforesaid, in the county aforesaid); but the said *T. E.* in his life-time, and the said *A. E.* executrix as aforesaid, since his death, have, and each of them hath, hitherto wholly refused, and the said *A. E.* executrix as aforesaid, still refuses; wherefore the said *A. S.* saith she is injured, and hath sustained damage to the value of 30*l.* and therefore she brings her suit, &c.

Middlesex, (fl.) *J. D.* late of *Westminster*, in the county of *Middlesex*, hosier, was attached to answer *D. M.* executor of the last will and testament of *J. M.* deceased, in a plea of trespass on the case; and whereupon the said *D. M.* by *E. F.* his attorney, complains, *For that whereas* the said *J. D.* on the first day of *November*, in the year of our Lord 1792, to wit, at *Westminster*, in the said county, was indebted to the said *J. M.* in his life-time, in 100*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandizes, by the said *J. M.* in his life-time, before that time sold and delivered to the said *J. D.* at his special instance and request; and being so indebted, he the said *J. D.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook and faithfully promised the said *J. M.* in his life-time, to pay him the said sum of money, when he should be thereto afterwards requested. *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *J. M.* in his life-time, at the like request of the said *J. D.* had, before that time, sold and delivered to the said *J. D.* divers other goods, wares, and merchandizes, he the said *J. D.* undertook and faithfully promised the said *J. M.* in his life-time, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *D. M.* executor as

For an executor
for goods sold
and delivered,

Quantum meruit.

Conclusion.

Proffert of the
letters testamen-
tary.Declaration by
the assignees of
a bankrupt for
premiums of in-
surance, and
work done by
the bankrupt.

aforesaid, avers, that the said *J. M.* in his life-time, therefore reasonably deserved to have of the said *J. D.* other 100*l.* of like lawful money, to wit, at *Westminster* aforesaid, in the county aforesaid; whereof the said *J. D.* afterwards, to wit, on the same day and year aforesaid, there had notice: *Add a count for money laid out.* Yet the said *J. D.* not regarding his aforesaid several promises and undertakings so by him made in this behalf as aforesaid, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said *J. M.* in his life time; and the said *D. M.* executor as aforesaid, since his death, in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said *J. M.* in his life-time, or to the said *D. M.* executor as aforesaid, since his death, or to either of them (although so to do, he the said *J. D.* was requested by the said *J. M.* in his life-time oftentimes, and by the said *D. M.* executor as aforesaid, since his death, afterwards, to wit, on the *seventh* day of *December*, in the year aforesaid, and often afterwards, to wit, at *Westminster* aforesaid); but he to do this hath hitherto wholly refused, and still refuses; wherefore the said *D. M.* executor as aforesaid, saith he is injured, and hath sustained damage to the value of 200*l.* and therefore he brings his suit, &c. And he brings into court here the letters testamentary of the said *J. M.* whereby it fully appears to the court here, that the said *D. M.* is executor of the last will and testament of the said *J. M.* and hath the administration thereof, &c. For an administrator, *vide* my *Instr. Cler. K. B.* 5 edit. 194.

Middlesex, (ff.) *C. O.* late of *Wapping*, in the county of *Middlesex*, merchant, was attached to answer to *R. G.* and *R. T.* assignees of the estate, debts, and effects which were of *H. B.* a bankrupt, according to the form of the statutes made and now in force concerning bankrupts, in a plea of trespass on the case; and whereupon the said *R. G.* and
R. T.

R. T. assignees as aforesaid, by H. A. their attorney, complain, *That whereas, &c. Vide my Instr. Cler. K. B. 5 edit. 194.*

Middlesex to wit. *James Roe*, late of *Westminster*, in the said county, yeoman, was attached to answer *John Doe* in a plea of trespass on the case, and whereupon the said *John*, by *J. L.* his attorney, complains, *That whereas* the said *James*, on the 1st day of *May*, in the year of our Lord 1793, to wit, at *Westminster*, in the county aforesaid, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said *John*; and thereby, six weeks after the date thereof, promised to pay to the said *John*, by the name of *Mr. Doe*, or order, 20*l* for value received; by reason whereof, and by force of the statute in such case made and provided, the said *James* became liable to pay to the said *John* the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, he the said *James*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note. *And whereas* the said *James* afterwards, to wit, on the 15th day of *June*, in the year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in 30*l*. of lawful money, &c. *Add a count for money lent, money had and received, and the common conclusion, or what the consideration of the note was for.*

Declaration on note, payee v. drawer.

The exact day.

For a declaration, payee against acceptor, see my *Instr. Cler. K. B. 5 edit. 197.* So indorsees partners against acceptor on a bill drawn by partners payable to their own order.

London, to wit, *Thomas Roe* and *Stephen Hill* were attached to answer *John Mills*, in a plea of trespass

Declaration on a foreign bill of exchange, second indorsee against the first indorser.

trespass on the case ; and whereupon the said *John* by *R. L.* his attorney, complains, for that whereas on the 1st day of *January*, in the year of our Lord 1789, at *London* aforesaid, in the parish of *Saint Mary-le-Bow*, in the ward of *Cheap*, certain persons trading and using commerce in co-partnership together within this kingdom, to wit, at *London* aforesaid, in the parish and ward aforesaid, under the name, stile, and firm of *P. and Co.* according to the usage and custom of merchants from time immemorial used and approved of, made their certain bill of exchange in writing, their co-partnership, name, stile, and firm aforesaid being thereunto subscribed, bearing date the day and year aforesaid, and directed to one *J. B.* at *Venice* in *Italy*, in parts beyond the seas, and thereby requested the said *J. B.* at double usance to pay that his first of exchange (second and third of the same tenor not paid) to the said *Thomas* and *Stephen*, or their order, a certain sum of foreign money called in the said bill two hundred ducats, value received ; and then and there delivered the said bill to the said *Thomas* and *Stephen* ; which said bill the said *J. B.* afterwards, to wit, on the day and year aforesaid at *Venice*, to wit, at *London* aforesaid, in the parish and ward aforesaid, on sight thereof duly according to the usage and custom of merchants accepted ; and the said *Thomas* and *Stephen* afterwards, and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by their certain indorsement in writing then and there made upon the said bill, their proper hands being thereunto subscribed, according to the usage and custom of merchants, appointed the contents of the said bill to be paid to one *P. W.* or his order, and then and there delivered the said bill so indorsed to the said *P.* ; and the said *P.* afterwards, and before the payment of the said sum of money in the said bill mentioned, or of any part thereof, to wit, on the day
and

and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, by his certain indorsement in writing, then and there made upon the said bill, his proper hand being thereunto subscribed, appointed the contents of the said bill to be paid to the said *John*, and then and there delivered the said bill so indorsed to the said *John*, of which said indorsements the said *J. B.* afterwards, to wit, on the day and year aforesaid at *Venice*, to wit, at *London* aforesaid, in the parish and ward aforesaid, had notice. And the said *John* in fact says, that an usance mentioned in any bill of exchange drawn in *London*, and payable in *Venice*, is and at the several times aforesaid was three months from the date of the said bill, and no other time whatever; and that afterwards and when the said bill had according to the tenor and effect thereof become payable, to wit, on the 4th day of *July* in the year aforesaid, at *Venice* aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, the said bill was duly, according to the usage and custom of merchants, shewn and presented to the said *J. B.* for payment; and the said *J. B.* was then and there requested to pay the said sum of money in the said bill mentioned; but the said *J. B.* did not then or there pay the said sum of money in the said bill mentioned, or any part thereof, but wholly neglected and refused so to do; neither did he pay the said second or third of exchange in the said bill mentioned, or either of them; nor did the said persons so trading and using commerce in co-partnership together, under the name, stile, and firm of *P. and Co.* pay the said sum of money in the said bill mentioned, or any part thereof, or the said second or third of exchange. And thereupon the said *John* afterwards, to wit, on the day and year last aforesaid, at *Venice* aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, caused the said bill to be protested for non-payment; of all which premises the said *Thomas* and *Stephen* afterwards, to wit, on the
the

Assumpfit.

the day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, had notice, and by reason thereof, and by force of the usage and custom of merchants, became liable to pay to the said *John* the said sum of money in the said bill mentioned, or the value thereof, when the said *Thomas* and *Stephen* should be thereunto afterwards requested. And being so liable, they the said *Thomas* and *Stephen*, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and to the said *John* then and there faithfully promised, to pay to him the said sum of money in the said bill mentioned, or the value thereof, when they the said *Thomas* and *Stephen* should be thereunto afterwards requested. And the said *John* avers, that the said two hundred ducats in the said bill mentioned, on the day and year last aforesaid, were, and from thenceforth hitherto have been, and still are of great value, to wit, of the value of *l.* of lawful money of *Great Britain*, that is to say, at *London* aforesaid, in the parish and ward aforesaid. (*Add a count for money lent and money had and received.*) Yet the said *Thomas* and *Stephen*, not regarding their said several promises and undertakings so by them made in this behalf as aforesaid (same as in p. 246): Wherefore the said *John* says he is injured, and hath sustained damage to the value of 1000*l.* and therefore he brings his suit, &c.

Declaration for
an attorney's
bill.

Middlesex, (ss.) *L. H.* was attached by his majesty's writ of privilege, issuing out of the court here, to answer *E. A.* gentleman, one of the attornies of the court of the bench here, according to the liberties and privileges of the same court, for such attornies and other ministers of the same bench, time out of mind used and approved of in the same, of a plea of trespass on the case, &c. and thereupon the said *E. A.* in his proper person, complains, *That whereas* the said *L. H.* on the 20th day of *May*, in the year of our Lord 1793,

at

at *Westminster*, in the county of *Middlesex*, was indebted to the said *E. A.* in the sum of 300*l.* of lawful money of *Great Britain*, for work and labour, care and diligence, of the said *E.* by him the said *E.* before that time done and performed for the said *L.* as an attorney and solicitor of the said *L.* in and about the prosecuting and defending divers suits in law and equity for the said *L.* and in and about the drawing, making, and ingrossing divers deeds and writings for the said *L.* at his special instance and request: and also for divers journies and attendances by the said *E.* before that time taken, made, and performed in and about the said work, at the like instance and request of the said *L.*; and being so indebted, the said *L.* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *E.* to pay him the said sum of money when he should be thereunto afterwards requested. *And whereas also*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in the county aforesaid, in consideration that the said *E.* upon the retainer and at the like special instance and request of the said *L.* had before that time done and performed other his work and labor, care and diligence, for the said *L.* as an attorney and solicitor of the said *L.* in and about prosecuting and defending of divers other suits in law and equity for the said *L.* and in and about drawing, making, and ingrossing of divers other deeds and writings for the said *L.* And also had taken, made, and performed divers other journies and attendances in and about the said last-mentioned work at the like request of the said *L.* he the said *L.* then and there undertook and faithfully promised the said *E.* to pay him so much money as he reasonably deserved to have, when he the said *L.* should be thereunto afterwards requested. And the said *E.* in fact saith, that he therefore reasonably deserved to have of the said *L.* other 300*l.* of like lawful

Quantum meruit.

Conclusion.

lawful money, to wit, at *Westminster* aforesaid, in the county aforesaid; whereof the said *L.* afterwards, to wit, on the day and year aforesaid, there had notice. These two counts, save two others, being necessary. (*Add a count for money lent and advanced, for money laid out and expended, for money had and received, and on an account stated.*) Nevertheless, the said *L.* not regarding his said several promises and undertakings, by him made in this behalf as aforesaid, but contriving, and fraudulently intending, craftily and subtilly, to deceive and defraud the said *E.* in this respect, hath not yet paid the said several sums of money, or any part thereof, to the said *E.* (although so to do, the said *L.* afterwards, to wit, on the day and year aforesaid, and often afterwards, at *Westminster* aforesaid, in the county aforesaid, by the said *E.* was requested); but to pay the same, or any part, to the said *E.* hath hitherto wholly refused, and still refuses, to the damage of the said *E.* of 300*l.* and therefore he brings his suit, &c. Add pledges to prosecute. *John Doe* and *Richard Roe.*

Declarations in Debt.

On bond.
Obligee against
obligor.

LONDON, (ff.) *C. D.* late of *London*, grocer, was summoned to answer *A. B.* of a plea, that he render to him the said *A. B.* 800*l.* of lawful money of *Great Britain* which he owes to, and unjustly detains from him; and whereupon the said *A. B.* by *E. F.* his attorney, complains, *For that whereas* the said *C. D.* on the 20th day of *April*, in the year of our Lord 1793, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, by his certain writing obligatory, sealed with the seal of the said *C. D.* became held and firmly bound unto the said *A. B.* in the sum of 800*l.* to be paid to the said *A. B.* when he the said *C. D.* should be thereto afterwards requested. Yet the said *C. D.* (although often requested, &c.) hath not yet paid the said 800*l.* or any part thereof, to the said *A. B.* but to pay the same, or any part

part thereof, to the said *A. B.* hath hitherto wholly refused, and still doth refuse; wherefore the said *A. B.* saith, he is injured, and hath sustained damage to the value of 10*l.* and therefore he brings his suit, &c.

And he brings into court here the said writing *Proferet in curi* obligatory, sealed with the seal of the said *C. D.* which gives sufficient evidence of the debt aforesaid, in form aforesaid, the date whereof is on the day and year aforesaid, &c.

Middlesex, (ff.) *J. H.* late of *Oxford*, in the county of *Oxford*, yeoman, was summoned to answer *T. B.* in a plea, that he render to the said *T. B.* 22*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; and whereupon the said *T. B.* by *S. U.* his attorney, complains, *For that whereas* the said *T. B.* heretofore, to wit, in *Michaelmas* Term, in the 32d year of the reign of his present majesty, in the court of our Lord the King of the Bench, before *Alexander Lord Loughborough*, and his companions, then justices of our said Lord the King of the Bench aforesaid, to wit, at *Westminster*, in the county of *Middlesex*, by the consideration of the said court, recovered against the said *J. H.* 22*l.* which were adjudged by the said *T. B.* in and by the said court of the Bench aforesaid, according to the form of the statute in that case made and provided, for his costs and charges, which he had sustained in and about his defence in a certain plea of trespass on the case, on promises, against the said *T. B.* at the suit of the said *J. H.* whereof the said *J. H.* is convicted, as by the record and proceedings thereof, remaining in the said court of the Bench aforesaid, here, to wit, at *Westminster* aforesaid, more fully appears; which said judgment still remains in full force, vigor, and effect, not in the least reversed, annulled, paid off, or any ways satisfied; and the said *T. B.* hath not yet obtained any execution of the said judgment, whereby an action hath accrued to the said *T. B.* to demand

Declaration in debt upon judgment, recovered in the C. P. for the defendant.

and have of the said *J. H.* the said 22*l.* above demanded: yet the said *J. H.* (although often requested, &c.) hath not yet rendered to the said *T. B.* the said 22*l.* or any part thereof, but he to render the same, or any part thereof, to the said *T. B.* hath hitherto wholly refused, and still refuses; wherefore the said *T. B.* saith, he is injured, and hath damage to the value of 10*l.* and therefore he brings his suit, &c.

You will remember to intitle this declaration right, as the cause of action may accrue in the term.

Declaration in
debt on a bail-
bond.

Sheriff of the
county of Mid-
dlesex.

N. B. This form
will do for a
bond taken in
Middlesex, or
any other coun-
ty, as altered in
the margin.

Sheriff
was
his

Sheriff

London, (ff.) John Denn, late of *London*, grocer, was summoned to answer *Richard Fenn*, assignee of *William Newman*, esq. and *Thomas Baker*, esq. sheriffs of the said city of *London*, according to the form of the statute in such case made and provided, of a plea that he render to the said *Richard*, assignee as aforesaid, 600*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; and whereupon the said *Richard*, by *J. B.* his attorney, complains, *That whereas*, the said *Richard* heretofore, to wit, on the 5th day of *October*, in the year of our Lord 1789, sued forth out of the court of our said Lord the King of the Bench here, (the said court being then and now at *Westminster*, in the said county of *Middlesex*,) a certain writ of our Lord the King called a *capias ad respondendum*, directed to the said sheriffs, by which said writ the said sheriffs were commanded to take the said *John Denn*, if he should be found in their bailiwick, and him safely keep, so that they might have his body before his majesty's justices at *Westminster* on the morrow of *All Souls*, then next coming, to answer the said *Richard* in a plea of trespass; and also that the said *John* might answer the said *Richard* according to the custom of the court of our Lord the King of Common Bench here, in a certain plea of debt upon demand for 600*l.*; and that the said sheriffs should then have there that writ, which said writ afterwards and before the delivery to the said

said *sheriffs* for execution as hereafter is mentioned, *sheriff*
 was duly marked or indorsed for bail for 300*l.* by
 virtue of an affidavit made and filed in the said court,
 of the cause of action of the said *Richard*, in that
 behalf, according to the form of the statute in such
 case made and provided; which said writ so indorsed
 afterwards and before the return thereof, to wit, on
 the 14th day of *October*, in the year aforesaid, at
London aforesaid, in the parish and ward aforesaid,
 was delivered to the said *William Newman* and
Thomas Baker, then and still being *sheriffs of the said* *sheriff of the said*
city, to be executed in due form of law; by virtue *county*
 of which said writ, the said *William Newman* and
Thomas Baker, *sheriffs*, as aforesaid, afterwards and *sheriff*
 before the return of the said writ, to wit, on the
 day and year aforesaid, at *London* aforesaid, in the
 parish and ward aforesaid, and within *their* bailiwick, *his*
 took and arrested the said *John* by his body, and
 then and there had and detained him in *their* custody, *his*
 at the suit of the said *Richard*, for the cause aforesaid;
 and the said *John* being so arrested and in custody
 of the said *William Newman* and *Thomas Baker*,
sheriffs, as aforesaid, afterwards, and before the return
 of the said writ, to wit, on the same day and *sheriff*
 year aforesaid, at *London* aforesaid, in the parish
 and ward aforesaid, and within their bailiwick, took
 bail for the appearance of the said *John*, at the return
 of the said writ, and on that occasion the said *John*,
 on the said 14th day of *October*, in the year aforesaid,
 at *London* aforesaid, &c. by his certain writing obligatory,
 commonly called a bail-bond, sealed with his seal,
 and now shewn to the court here, the date whereof
 is the day and year last aforesaid, acknowledged
 himself to be held and firmly bound to the said
William Newman and *Thomas Baker*, *sheriffs* *Sheriff of the*
of the said city of London, by the names of *William* *county of*
Newman, Esquire, and *Thomas Baker*, Esquire, *Middlesex.*
sheriffs of the city of London, in the sum of 600*l.* of good *sheriff of, &c.*
 and lawful money of *Great Britain*, to be paid to
 the said *sheriffs*, or *their* certain attorney, executors,
 administrators, or assigns, when he the said *John* *sheriff*
 should *his*

should be thereunto required, with a condition to the said writing obligatory, underwritten, that if the said *John* should appear before the justices of our said Lord the King at *Westminster*, on the morrow of *All Souls*, to answer to the said *Richard*, in a plea of trespass; and also that the said *John* might answer the said *Richard*, according to the custom of his Majesty's court of Common Bench here, in a certain plea of debt upon demand for 600*l.*; that then the said obligation should be void and of no force, otherwise should stand and remain in full force, vigour, and effect, as by the said writing obligatory, and the said condition thereof (relation being thereto had), will more fully appear: which said writing obligatory, with the condition thereunder written was taken by the said *Sheriffs*, by virtue of the said writ, and by force of the statute in such case lately made and provided; and the said *Richard* in fact saith, that the said *John* did not appear before his Majesty's justices at *Westminster*, on the morrow of *All Souls*, in the condition aforesaid mentioned, according to the exigency of the said writ, whereby the said writing obligatory became forfeited, and the said sum of money therein mentioned, or any part thereof, not being paid to the said *Sheriffs*, the said *William Newman* and *Thomas Baker*, then and now being *Sheriffs* of the said city of *London*, afterwards, to wit, on the 16th day of *November*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, at the request, costs, and charges of the said *Richard*, the plaintiff in the said suit, by an indorsement on the back of the said writing obligatory, made and attested in the presence of two credible witnesses, sealed with their seal of office of *Sheriffs*, assigned the said writing obligatory to the said *Richard* according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory, and duly stamped before the commencement of this suit, according to the form of the statute in this

Sheriff

Sheriff

*Sheriff of the said
county*

his

Debt.

case made, and to the court now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by reason of which said premises, and by force of the statute in that case made and provided, an action hath accrued to the said *Richard*, as assignee of the said *William Newman* and *Thomas Baker*, sheriffs of the said city of *London*, as aforesaid, to demand and have of the said *John* the said sum of 600 *l.* above demanded: nevertheless the said *John* (although often required) hath not paid the said 600 *l.* above demanded, or any part thereof, to the said *William Newman* and *Thomas Baker*, or to either of them, before the said assignment, or to the said *Richard*, assignee as aforesaid, since the said assignment, or to either of them, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses; wherefore the said *Richard*, assignee as aforesaid, says he is injured, and hath sustained damage to the value of 20 *l.* and therefore he brings his suit, &c.

sheriff of the said county.

London, (ff.) *William Doe*, late of *London*, grocer, was summoned to answer *Richard Fenn*, assignee of *William Newman*, Esquire, and *Thomas Baker*, Esquire, sheriffs of the said city of *London*, according to the form of the statute in such case made and provided, of a plea, that he render to the said *Richard*, assignee as aforesaid, 600 *l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; and whereupon the said *Richard*, by *J. B.* his attorney, complains, *That whereas*, the said *Richard* heretofore, to wit, on the 5th day of *October*, in the year of our Lord 1789, sued forth out of the said court of our said Lord the King of the Bench here (the said court being then and now at *Westminster*, in the said county of *Middlesex*), a certain writ of our Lord the king, called a *capias ad respondendum*, directed to the said sheriffs, by which said writ, the said sheriffs were commanded to take one *John Denn*, if he should be found in their bailiwick, and him safely keep, so

Declaration upon a bail-bond against one of the bail.

should be thereunto required, with a condition to the said writing obligatory, underwritten, that if the said *John* should appear before the justices of our said Lord the King at *Westminster*, on the morrow of *All Souls*, to answer to the said *Richard*, in a plea of trespass; and also that the said *John* might answer the said *Richard*, according to the custom of his Majesty's court of Common Bench here, in a certain plea of debt upon demand for 600*l.*; that then the said obligation should be void and of no force, otherwise should stand and remain in full force, vigour, and effect, as by the said writing obligatory, and the said condition thereof (relation being thereto had), will more fully appear: which said writing obligatory, with the condition thereunder written was taken by the said *sheriffs*, by virtue of the said writ, and by force of the statute in such case lately made and provided; and the said *Richard* in fact saith, that the said *John* did not appear before his Majesty's justices at *Westminster*, on the morrow of *All Souls*, in the condition aforesaid mentioned, according to the exigency of the said writ, whereby the said writing obligatory became forfeited, and the said sum of money therein mentioned, or any part thereof, not being paid to the said *sheriffs*, the said *William Newman* and *Thomas Baker*, then and now being *sheriffs* of the said city of *London*, afterwards, to wit, on the 16th day of *November*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, at the request, costs, and charges of the said *Richard*, the plaintiff in the said suit, by an indorsement on the back of the said writing obligatory, made and attested in the presence of two credible witnesses, sealed with their seal of office of *sheriffs*, assigned the said writing obligatory to the said *Richard* according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory, and duly stamped before the commencement of this suit, according to the form of the statute in that

sheriff

sheriff

*sheriff of the said
county*

his

case made, and to the court now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by reason of which said premises, and by force of the statute in that case made and provided, an action hath accrued to the said *Richard*, as assignee of the said *William Newman* and *Thomas Baker*, sheriffs of the said city of *London*, as aforesaid, to demand and have of the said *John* the said sum of 600*l.* above demanded: nevertheless the said *John* (although often required) hath not paid the said 600*l.* above demanded, or any part thereof, to the said *William Newman* and *Thomas Baker*, or to either of them, before the said assignment, or to the said *Richard*, assignee as aforesaid, since the said assignment, or to either of them, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses; wherefore the said *Richard*, assignee as aforesaid, says he is injured, and hath sustained damage to the value of 20*l.* and therefore he brings his suit, &c.

sheriff of the said
county.

London, (ff.) *William Doe*, late of *London*, grocer, was summoned to answer *Richard Fenn*, assignee of *William Newman*, Esquire, and *Thomas Baker*, Esquire, sheriffs of the said city of *London*, according to the form of the statute in such case made and provided, of a plea, that he render to the said *Richard*, assignee as aforesaid, 600*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; and whereupon the said *Richard*, by *J. B.* his attorney, complains, That whereas, the said *Richard* heretofore, to wit, on the 5th day of *October*, in the year of our Lord 1789, sued forth out of the said court of our said Lord the King of the Bench here (the said court being then and now at *Westminster*, in the said county of *Middlesex*), a certain writ of our Lord the king, called a *capias ad respondendum*, directed to the said sheriffs, by which said writ, the said sheriffs were commanded to take one *John Denn*, if he should be found in their bailiwick, and him safely keep, so

Declaration upon
on a bail-bond
against one of
the bail.

Debt:

that they might have his body before his Majesty's justices at *Westminster*, on the morrow of *All Souls*, then next following, to answer the said *Richard*, in a plea of trespass; and also that the said *John* might answer the said *Richard*, according to the custom of the court of our Lord the King of Common Bench here, in a certain plea of debt upon demand for 600*l.* and that the said sheriffs should have there that writ; which said writ, afterwards and before the delivery thereof to the said sheriffs for execution, as hereafter is mentioned, was duly marked or indorsed for bail for 300*l.* by virtue of an affidavit made and filed in the said court, of the cause of action of the said *Richard* in that behalf, according to the form of the statute in that case made and provided, which said writ, so indorsed afterwards and before the return thereof, to wit, on the 14th day of *October*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was delivered to the said *William Newman* and *Thomas Baker*, then and still being sheriffs of the said city, to be executed in due form of law; by virtue of which said writ, the said *William Newman* and *Thomas Baker*, sheriffs as aforesaid, afterwards and before the return of the said writ, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took and arrested the said *John Denn*, by his body, and then and there had and detained him in their custody, at the suit of the said *Richard*, for the cause aforesaid; and the said *John Denn* being so arrested, and in custody of the said *William Newman* and *Thomas Baker*, sheriffs as aforesaid, afterwards and before the return of the said writ, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, and within their bailiwick, took bail for the appearance of the said *John Denn*, at the return of the said writ, and on that occasion the said *William Doe*, as bail or surety of the said *John*, on the said 14th day of *October*, in the year aforesaid, at *London* aforesaid, in the pa-

rish and ward aforesaid, by his certain writing obligatory, commonly called a bail-bond, sealed with his seal, and now shewn to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said *William Newman* and *Thomas Baker*, sheriffs of the said city of *London*, by the names of *William Newman*, Esquire, and *Thomas Baker*, Esquire, sheriffs of the city of *London*, in the sum of 600*l.* of good and lawful money of *Great Britain*, to be paid to the said sheriffs, or their certain attorney, executors, administrators, or assigns, when he the said *William* should be thereunto required, with a condition to the said writing obligatory underwritten, that if the said *John Denn* should appear before the justices of the Lord the King at *Westminster*, on the morrow of *All Souls*, to answer to the said *Richard* in a plea of trespass; and also that the said *John* might answer the said *Richard*, according to the custom of his Majesty's court of Common Bench here, in a certain plea of debt upon demand, for 600*l.*; that then the said obligation should be void and of no force, otherwise should stand and remain in full force, vigor, and effect, as by the said writing obligatory, and the said condition thereof, relation being thereunto had, will more fully appear; which said writing obligatory, with the condition thereunder written, was taken by the said sheriffs, by virtue of the said writ, and by force of the statute in such case lately made and provided; and the said *Richard* in fact saith, That the said *John* did not appear before his Majesty's justices at *Westminster*, on the morrow of *All Souls*, in the condition aforesaid mentioned, according to the exigency of the said writ, whereby the said writing obligatory became forfeited, and the said sum of money therein mentioned, or any part thereof, not being paid to the said sheriffs, the said *William Newman* and *Thomas Baker*, then and now being sheriffs of the said city of *London*, afterwards, to wit, on the 16th

day of *November*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, at the request, costs, and charges of the said *Richard*, the plaintiff in the said suit, by an indorsement on the back of the said writing obligatory, made and attested in the presence of two credible witnesses, sealed with their seal of office of sheriffs, assigned the said writing obligatory to the said *Richard*, according to the form of the statute in such case made and provided, as by the said assignment indorsed on the said writing obligatory, and duly stamped before the commencement of this suit, according to the form of the statute in that case made and provided, and to the court now here shewn, the date whereof is the day and year last aforesaid, may more fully appear; by reason of which said premises, and according to the form of the statute in that case made and provided, an action hath accrued to the said *Richard*, as assignee of the said *William Newman* and *Thomas Baker*, sheriffs of the said city of *London* as aforesaid, to demand and have of the said *William* the said sum of 600*l.* above demanded: *Nevertheless*, the said *William* (although often required) hath not yet paid the said 600*l.* above demanded, or any part thereof, to the said *William Newman* and *Thomas Baker*, or to either of them, before the said assignment, or to the said *Richard*, assignee as aforesaid, since the said assignment, or to either of them, but he to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses; wherefore the said *Richard*, assignee as aforesaid, says he is injured, and hath sustained damage to the value of 20*l.* and therefore he brings his suit, &c.

If by the late
sheriffs,

If the bond be assigned by the *late sheriffs*, (add that word,) and that they as *late sheriffs* assigned the same to the plaintiff; and instead of the words *now being sheriffs*, say (*then being sheriffs*); and the *venue* may be laid in *London*, although the arrest and assignment was made in the country. 2 *Lord Raym.* 1455. 2 *Str.* 727.

Declarations

Declarations in Trespass and Assault.

MIDDLESEX, (ff.) *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, of a plea wherefore, with force and arms, &c. he made an assault on the said *John*, to wit, at *Westminster*, in the said county, and there beat, bruised, wounded, and ill-treated him, so that his life was thereby in great danger, and there did other wrongs to the said *John*, to the great damage of the said *John*, and against the peace of our Lord the now King, &c. ; and whereupon the said *John Denn*, by *James March*, his attorney, complains, *For that* the said *Richard*, on the 1st day of *October*, in the year of our Lord 1793, with force and arms, to wit, with swords, staves, sticks, and fists, made an assault on the said *John*, to wit, at *Westminster*, in the said county, and then and there beat, bruised, wounded, and ill-treated him, so that his life was thereby in great danger, and then and there did other wrongs to the said *John*, to the great damage of the said *John*, and against the peace of our Lord the now King, &c. ; wherefore the said *John* saith, that he is injured, and hath sustained damage to the value of 20*l.* and therefore he brings his suit, &c.

Declaration for
a common
assault.

Middlesex, to wit, *Richard Fenn*, late of *Westminster*, in the said county, yeoman, was attached to answer *John Denn*, in a plea, wherefore with force and arms, &c. he made an assault on the said *Richard*, to wit, at *Westminster*, in the said county, and beat, bruised, wounded, and ill-treated him, and imprisoned him, and kept and detained him in prison there for a long time, without any reasonable or probable cause whatsoever, contrary to the laws and customs of this realm, and against the will of the said *John* ; and there did other wrongs to the said *John*, to the great damage of the said *John*, and against the peace of our Lord the now King, &c. ; and thereupon the said *John*, by *J. L.* his attorney, complains, *For that* the said *Richard*, on the first day of *November*, in the year of our Lord 1793, to wit,

For an assault
and imprisonment.

wit, at *Westminster*, in the said county, with force and arms, to wit, with swords, staves, and sticks, made an assault on the said *John*, and then and there beat, bruised, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison for a long time, to wit, for the space of five hours then next following, without any reasonable or probable cause whatsoever, contrary to the laws and customs of this realm, and against the will of the said *John*; and then and there did other wrongs to the said *John*, against the peace of our Lord the now King, &c.; wherefore the said *John* saith, that he is injured, and hath sustained damage to the value of 50*l.* and therefore he brings his suit, &c.

Trespasse for
breaking close
with cattle and
spoiling the
earth, and break-
ing gates, &c.

Oxfordshire, (ss.) *Richard Fenn*, late of *Witney*, in the said county, yeoman, was attached to answer *John Denn*, in a plea wherefore with force and arms, &c. he broke and entered the close of the said *John*, called the *Butts*, situate, lying and being in the parish of *Burford*, in the said county, and trod down, consumed, and spoiled, the grass and corn of the said *John*, there growing, of the value of 10*l.* with his feet in walking, and with certain cattle eat up, trod down, consumed, and spoiled, other the grass and corn of the said *John*, there also growing, of the value of other 10*l.* and with the feet of the said cattle, and also with spades, pickaxes, and other iron instruments, dug up, tore up, rooted up, subverted and spoiled the earth and soil of the said *John*, in the said close, and the gates, posts, pales, and rails, of the said *John*, there erected, standing, and being, cut down, broke down, prostrated, and destroyed, and the materials thereof coming, of the said *John*, of the value of 50*l.* took and carried away, and converted and disposed thereof to his own use, and other wrongs to the said *John* there did, to the great damage of the said *John*, and against the peace of our Lord the now King; and whereupon the said *John*, by *R. L.* his attorney, complains, *For that* the said *Richard*, on the 1st day
of

of *January*, in the year of our Lord 1793, and on divers other days and times between that day and the day of suing forth the original writ of the said *John*, with force and arms, &c. broke and entered the close of the said *John*, called the *Butts*, situate, lying and being in the parish of *Burford*, in the said county, and trod down, consumed, and spoiled, the grass and corn of the said *John*, there then growing, of the value of 10*l.* with his feet in walking, and with certain cattle, to wit, horses, mares, geldings, cows, and sheep, eat up, trod down, consumed, and spoiled, other the grass and corn of the said *John*, there then growing, of the value of other 10*l.* and with the feet of the said cattle, and also with spades, pickaxes, and other iron instruments, dug up, tore up, rooted up, subverted and spoiled the earth and soil, to wit, 500 perches of the earth, and 500 perches of the soil, of the said *John* in the said close, and the gates, posts, pales, and rails, to wit, 50 gates, 50 posts, 50 pales, and 50 rails, of the said *John*, there then erected, standing and being, cut down, broke down, prostrated and destroyed, and the materials thereof coming, to wit, 50 cart-loads of wood, of the said *John*, of the value of 10*l.* took and carried away, and converted and disposed thereof to his own use, and other wrongs to the said *John* then and there did, to the great damage of the said *John*, and against the peace of our Lord the now King, &c. to the said *John* his damage of 100*l.* and therefore he brings his suit, &c.

Oxon, (ff.) *G. R.* late of, &c. was summoned to answer *S. G.* of a plea, wherefore he took the cattle of the said *S.* and unjustly detained them against surety and pledges, &c. and whereupon the said *S.* by *S. P.* his attorney, complains that the said *G.* on the 31st day of *January*, in the year of our Lord 1793, at the parish of *W.* in a certain place called *White's Hill*, in the said county, took the cattle of the said *S.* to wit, 35 sheep, and unjustly detained them

Declaration in
replevin for cat-
tle.

them against sureties and pledges, until, &c. wherefore the said S. says that he is injured, and hath sustained damage to the value of 100*l.* and therefore he brings his suit, &c.

The place to be inserted.

The particular place of taking the goods, &c. ought to be inserted in every declaration in replevin, and that *cepit in alia loco* is to be considered as a plea in bar, and not in abatement. *Bullythorpe v. Turner. Barnes 353.*

Of staying Proceedings in a second Action for the same Cause until the Costs of a former Action are paid.

Easter Term
1770.

The plaintiffs, foreigners, residing in Germany, brought an action in the King's Bench against the present defendant for forage found for the *British* troops in Germany at the request of the defendant's testator to the amount of 10,000*l.*; which cause was tried, and plaintiffs non-suited upon the merits, and afterwards a new trial was refused. In *Michaelmas* Term 1770 plaintiffs brought another action in this court, and declared upon the same contract as in K. B. In this term, *Hil. 11 Geo. 3.* it was now moved, on behalf of the defendant, that the proceedings might be staid in this action until the plaintiffs shall have paid the costs of the non-suit in the K. B. being 48*l.* 10*s.* The motion was made on two grounds: 1st, That plaintiffs were foreigners residing in Germany; 2d, That this second action is vexatious, inasmuch as the court of K. B. had declared the plaintiff had no right of action on the contract. And *Gravenor v. Cape* was cited, *E. 9 Geo. 3. C. B.* and *Bass v. Firmen*, *1 Ld. Ray. 697. 1 Vent. 100. Ld. Byron's case. De Grey, C. J.* The plaintiffs ought to be content with the judgment of B. R. and that the present action is vexatious, and upon that ground only proceedings therein ought to stay until the plaintiffs pay the costs taxed upon the non-suit. I lay the matter of the plaintiff, being foreigners, quite out of the case, and think the rule ought to be made absolute, for this

this reason only, because the present action is vexatious. Gould, J. of same opinion. The old law points out this to the court as a duty, Stat. Marl. 52 H. 3. c. 6. Lord Coke in his comment thereon says, there is no greater injustice, than when under color of justice injury is done. That multi litigant in foro non ut aliquid lucrentur, sed ut vexent alios, &c. Blackstone, J. of same opinion. I think in all cases where the merits have been tried, plaintiffs should not be permitted to commence a second action to try the same matter, before costs are paid in the first. Nares, J. of same opinion. Melchart & al. v. Halfey & al. executors. 3 Wils. 149.

Venue.

Venue,

VENUE (*vicinetum*, or *visnetum*) is the place from whence a jury are to come for the trial of causes, which is generally some neighbouring place, *Locus quem vicini habitant*, from whence it is called *vicinetum*, or *venue*.

General rule of law respecting the venue.

The general rule of law, as laid down by Lord Coke, is, *That every trial shall be out of that town, parish, or hamlet, or place known, out of the town, &c. within which the matter of fact issuable is alledged, that is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact.* Co. Lit. 125. a.

Many niceties got over.

Many niceties which were formerly to be observed with respect to laying the *venue*, are now removed by the 4 & 5 Ann. c. 16. which enacts, *That every venire facias, for the trial of any issue, shall be awarded of the body of the proper county where such issue is triable.* Also see stat. 24 Geo. 2. c. 18. *with respect to penal actions.*

Venire in penal statutes where to be awarded.

By stat. 24 Geo. 2. c. 18. Every *ven. fac.* for the trial of any issue in any action or information upon any penal statute in any of his majesty's courts of record at *Westminster*, in the counties palatine of *Lancaster*, *Chester*, and *Durham*, and the principality of *Wales*, shall be awarded of the body of the proper county where such issue is triable.

Real actions to be laid in the proper county.

All actions, real or mixed, as trespass, *quare clausum fregit*, *ejectment*, *waste*, &c. must be laid in the county where the lands lie. *Bract.* 189. 414. So debt for rent, against an assignee of a term, on the privity of estate, is local, and will lie no where but in that county where the lands are. *Cro. Car.* 183. *Litch.* 187. *Jon.* 43. Debt upon escape is also local. 2 *Lill. Ab.* 782.

Personal actions not.

In all personal actions, as debt, detinue, assault, deceit, trover, and conversion, account, slander, and the

the like, the plaintiff may declare in what county he pleases. *Co. Lit.* 282. So against a sheriff for a false return. 1 *Wils.* 136. If a personal action be founded upon a thing done out of the realm, it may be brought in any county, and shall be alledged at such a place, in such a county: as if the debt be upon a bond or bill made at *Hamburgh*, it may be alledged at *H. viz. at Islington, in the county of Middlesex.* *Latch.* 4. *Salk.* 660. So upon bond. *Salk.* 659. *Lut.* 950. 2 *Cro.* 76.

When an action is for a transitory thing, it may be brought in any county, as if it be upon a covenant or contract, or debt at large; for *debitum ex contractus sunt nullius loci.* 7 *Co.* 3. a. 2 *Inst.* 229. 231.

Transitory;

When an action is founded upon two things in different counties, both *material* to the maintenance of the action, it may be brought in the one county or the other. 7 *Co.* 2. a. *Dy.* 38. b. 40. a. *Salk.* 669. As if an arrest be in one county, and an escape in another. 1 *Lev.* 114. So in an action for a false return of *non est inventus*, where the sheriff was in company of the party. 2 *Mod.* 23. So if the matter in one county is dependant upon matter in another, the plaintiff may have the action in the one county or the other. 7 *Co.* 1. b. As if two conspire to indict another, and make the execution of the conspiracy in another county, conspiracy lies in the one county or the other. 7 *Co.* 1. b. So for maliciously suing an execution in *Middlesex*, where-by he was arrested in *Dorsetshire.* *Cro. Eliz.* 574. So if an action on the case be against the sheriff of *Denbighshire*, for not arresting a man upon a *capias utlagatum* to him directed in *Denbighshire*, upon which he returned *non est inventus*, it may be in *Denbighshire*, or in *Middlesex*, where the return was made. *Hob.* 209.

When the action is founded on two things in different counties, how to be brought.

In an action upon a lease for rent, &c. founded on the privity of contract, as in debt by the lessor against the lessee, 6 *Mod.* 194. 2 *Str.* 776. or his executor in the *detinet* only, *Gilb.* 403. or in covenant

Action on lease, lessor v. lessee.

nant

nant by the lessor, 3 *Lev.* 154. or grantee of the reversion, 1 *Saund.* 238. 1 *Wils.* 165. *Carth.* 183. against the lessee the action is transitory; and the venue may be laid in any county, at the option of the plaintiff.

Where it is local as founded on the merits of estate.

In actions founded on the *privity of estate*, as in debt by the assignee, 1 *Wils.* 165. or devisee, *W. Jon.* 43. of the lessor against the lessee, or by the lessor, or his personal representatives, against the assignee of the lessee, or against the executor of the lessee in the *debet and detinet*, 6 *Mod.* 194. *Latch.* 197. 2 *Lev.* 80. *Gilb. C. P.* 91. or in covenant by the grantee of the reversion against the assignee of the lessee, the action is local, *Carth.* 182. 1 *Salk.* 80. and the venue may be laid in the county where the estate lies.

If assault happens abroad, may lay venue in London.

If an assault and imprisonment happens in *Minorca*, it may be laid at *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*. *Fabrics v. Mostyn*, *Hil. T.* 1775; and if the plaintiff was banished from *Minorca* to *Carthagera*, it may be laid in *Minorca*, to wit, at *London*, &c. *Cowp. Rep.* 178.

Every transitory action may be laid in any county in *England*, though the matter arise beyond sea. *Ibid.* 181.

Actions on penal statutes to be laid in their proper county.

By *Stat. 21 Jac. 1. c. 4.* All suits on penal statutes shall be laid in their proper county; and if on the general issue pleaded, the offence be not proved in the same county in which it is laid, the defendant shall be found not guilty.

Construction of the act.

This act does not extend to any offence created since the statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is as to them as it were repealed *pro tanto*. 1 *Salk.* 372. by ten judges. Secondly, That all informations and popular actions in penal statutes made, before that act, must by force of 21 *Jac. 1. c. 4.* be laid, brought, and prosecuted in the proper county where the fact was done. *Ibid.* *Bunbury* 236.

Also

Also actions against any person or persons for any thing done by an officer or officers of the excise or customs, 20 Geo. 3. c. 70. s. 34. 24 Geo. 3. sess. 2. c. 47. s. 35. or others acting in their aid, in execution, or by reason of his or their office. These must be laid in the county where the facts were committed, and not elsewhere.

Excise and customs.

So if actions be brought against any justice, mayor or bailiff of any city, town corporate, headborough, portreeve, constable, tithingman, collector of subsidy, fifteenths, churchwardens, and other persons called sworn men, executing the office of churchwarden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, &c. the venue must be laid where the fact was committed, or the defendant must be found not guilty. Stat. 21 Jac. 1. c. 12. sect. 5. Vide Str. 446. Vaughan 113.

So against officers, &c.

A nuisance must be laid in the proper county, and debt for rent against the assignee of a term on the privity of estate is local, and will lie no where but in the county where the lands are. Cro. Car. 133. Jones 43. But debt for rent against the lessee may either be laid where the lands lie, or the deed was made. Str. 776.

Nuisance, debt for rent, local.

The county in the margin of the declaration will help, but not hurt; hence if there be no venue laid in the body of the declaration, reference must be had to the margin; but where a proper venue is laid in the body, the word in the margin will not vitiate it. Vide R. Temp. Hard. 343. 3 Term Rep. K. B. 387. Where the action could only have arisen in a particular county, it is local, and the venue must be laid in that county; for if it be laid elsewhere, the defendant may demur to the declaration, or the plaintiff on the general issue will be nonsuited. 1 Wils. 165. 2 Black. Rep. 1033. Cow. 410.

If no venue be laid in the body of declaration,

Of

Of changing the Venue in transitory Actions.

Court will not change the venue to any of the four northern counties previous to spring circuit.

In what cases venue cannot be changed.

Venue not changeable in scand. mag. note or bill of exchange.

Libel.

The *stat.* of 6 R. 2. c. 2. having ordered all writs to be laid in their *proper counties*, this, as the judges conceived, impowered them to change the *venue*, if required, and not to insist rigidly on abating the writ, which practice began in the reign of James the First, 2 Salk. 670; and this power is discretionally exercised, so as not to *cause* but *prevent* a *defect of justice*; therefore the court will not change the *venue* to any of the *four northern counties*, previous to the spring circuit; because there the *assizes* are holden only once a year, at the time of the summer circuit. *Cooke's Rep.* 129.; nor can it be changed, *but to a county where the whole cause of action arose.* 1 Wils. 178. *Herring v. Durant.*

The court held, that the *venue* may be changed in all actions in their nature *transitory*, except in cases of *privilege, specialty, promissory note, or bill of exchange.* *Everest v. Sansum Barnes* 491.

The *venue* is not changeable in an action for *scand. mag.* Lord Griffin v. Buckley. *Barnes* 482. Nor on a promissory note, plaintiff consenting to give evidence on the note. *The Duke of Bedford v. Bray. Barnes* 491. Nor on a bill of exchange, plaintiff undertaking not to give evidence on any other count, save on the bill. *Mauger v. Hinde. Barnes* 487.

So in covenant on a deed, for the *venue* cannot be changed, the action being on a specialty. *Bradley v. Adey, Barnes* 491. In debt on bond, *Barn.* 379. So in an action for a false return. *Salk.* 669. But it is laid down in 3 Burr. 1564. with good reason, "that in transitory actions the court ought to change the *venue*, when it appears, upon the circumstances laid before them, that there is a *probable ground* to apprehend that a *fair, impartial, or at least a satisfactory trial* cannot be had." *Mylock v. Saladine.*

Motion to change the *venue* in an action for a libel in a paper. Court of King's Bench refused,

1 Term

1 *Term Rep.* 571. my book *K. B.* 224. But it may, in a letter written in *Yorkshire*, and sent to *Germany*, be changed from *London* to *Yorkshire*, 3 *Term Rep.* 652. my book 225. If written in one place and sent to another, both in the same county, the venue may be changed into the county in which it was both written and published, 3 *Term Rep.* 316. *Freeman v. Norris.* my *Instr. Cler.* 225.

If the cause of action arise in *Wales*, and the venue laid in *London*, the court will, on affidavit, order the venue to be changed into the next *English* county; and the motion must be to change it into the *Welsh* county, and not into the adjoining *English* county, because the affidavit must express in what county, and not *elsewhere*, the cause of action arises: but after the venue is so changed, the cause may be tried in the next adjoining *English* county; and therefore it cannot be changed out of the adjoining *English* county into *Wales*. 2 *Black. Rep.* 962. *Freeman v. Gwyn.*

If the cause of action arise in *Wales*, and the venue in *London*, it may be changed into the next *English* county. *Str.* 1258. 1270.

The venue cannot be changed into a county palatine, *Barnes* 488. *Richardson v. Walker* and *al.* but it was changed into *Chester*, because the court can send down the record by *mittimus*. *Lord Raym.* 1418.

Cannot be changed into a county palatine, but may be to *Chester*.

The venue may not be changed from a county at large into a city or town and county. *Pract. Reg.* 429. *Earby v. Windus*; but it has been changed from a county at large, viz. from *Norfolk* into *London*, *Bickley v. Mackerell.* *Barnes* 181. *Salk.* 670. And it may be changed from one city and county to another city and county, viz. from the city of *Norwich* to *London*, *Gallant v. Squire.* *Pract. Reg. C. P.* 429.; but it cannot be changed into *Hull*, *Canterbury*, &c. because it is not known when an assize will be held there; nor in the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and county at large are held at the same place: but the reporter says, all this is in the discretion of the court. *Barnes*

In what cases it may be changed from a county at large into a city and county.

In Easter or Michaelmas Term may be changed.

490. *Rickaby v. Wilson*. In Easter or Trinity term the venue may be changed into a city or county where the assizes are held but once a year, as *Bristol, Cumberland, &c.* In Michaelmas and Hilary term there is no certain rule, but the court should change the venue then, if it can be done, without manifest inconvenience. *Per Cur. Barnes* 490. S. C.

If cause of action arise in Berwick, the venue must be in Northumberland.

If the cause of action arise in *Berwick* only, the venue, it seems, should be in *Northumberland*. 2 *Black. Rep.* 1036. *Mayor of Berwick v. Ewart*.

Venue not changed in action on promissory note.

Action by attorney on a promissory note and other counts, motion to change the venue from *Middlesex* to *Stafford* on the usual affidavit. *Davy* shewed cause, and undertook to give evidence on the note. Rule discharged. 2 *Black. Rep.* 993. *Dotney v. Bryan*.

Venue changed from London to Carmarthen-shire.

Venue was changed from *London* to *Carmarthen-shire*, but no cause was shewn. *Freeman v. Gwyn*. 2 *Black. Rep.* 962.

Attorney has no privilege to change the venue if in *Middlesex*, though he may keep it there, if plaintiff.

An attorney has no privilege to have the venue changed into *Middlesex*, where he is defendant, though he has a privilege, when plaintiff, to lay it and keep it there (unless he sues in *auter droit* as executor, &c. or jointly with another person), the privilege is lost: serjeants and officers of the court have the like privilege. *Barnes* 493. *Long v. Bailies*. *Rep. & Cas. Pract. C. P.* 145. *Pract. Reg.* 419. *Welland v. Trument*. So in *K. B.* 4 *Burr.* 2027. *Pope v. Readferne*.

If serjeants, &c. sue by *capias*, the venue may be changed.

But if a serjeant at law, or an attorney, be plaintiff, and sues by a *capias*, and not by writ of privilege, the venue may be changed, for he has thereby waived his privilege, and is to be considered only as a common person. *Pract. Reg.* 420. *Girdler, serjeant at law, v. Mathews*. *Barnes* 484. S. C.

If an attorney is plaintiff, the venue cannot be changed.

Action retained in *Middlesex*, on motion to change the venue into *Worcestershire*, in right of plaintiff's privilege as an attorney, though attachment

ment was not a *testatum* out of *Middlesex*. *Barnes* 493. *Long one, &c. v. Bailies*.

Motion to change the *venue* from *Middlesex* to *Lancaster*. Court directed that on these motions to counties palatine the words, "*undertaking not to assign for error the want of an original,*" be added to the common rule. *Hil. 28 Geo. 3. Marjden v. Bell*.

If venue be changed to Lancaster.

Within what Time Venue may be changed.

The defendant cannot move to change the *venue* in any action until his *appearance be entered*, nor after plea pleaded. *Coffar v. Standen. Cooke's Rep. 112. Same practice in K. B. Loft. 321. my K. B. Prac. 227.*

When the venue may be changed.

That although the declaration be delivered seven days before the last day of the next precedent term, or after, yet before plea, upon oath made, the *venue* may be changed upon motion in the said transitory actions the next term after; and the defendant to plead to the new action as he should have done, in the other without delay. *R. Mich. 1654. sect. 8.* That the *venue* may be changed (upon oath), though the defendant come in by exigent. *ibid.* Same rule in K. B.

Venue, where changeable in transitory actions.

When to plead thereto.

May be changed, if defendant, comes in by exigent.

By rule, *Mich. 16 Geo. 2.* It is ordered, That any defendant may move to change the *venue* at any time *before plea pleaded*, in all such actions where the *venue* may be changed by the course of this court, notwithstanding such defendant or defendants may have applied for, and obtained further time to plead before such motion. So is the practice in K. B. *Sir. 858. Vide my K. B. Practice, 5 edit. 228.*

Venue may be changed before plea.

It has been held, that a summons or order for time to plead shall be no bar to a motion to change the *venue*. *Dennis v. Fletcher. Barnes 489.*; nor after an order for an imparlance. *ibid. 487. Blackstock v. Payne.* So in K. B. *Cow. Rep. 51.*

Summons and order no bar,

unless rejoining gratis, and taking short notice of trial.

But on application to change the *venue* after a judge had given an order for time to *plead*, defendant consenting to rejoin gratis, and take notice of trial at the sitting after term, the court held it came too late, and that defendant's consent should bind him. So in *K. B. Cow. 51*. Had the judge been informed of the defendant's intention to move to change the *venue*, he would have made his order without prejudice to such motion. *Hunter v. Gray. Barnes 493*. Same in *K. B. Cowp. 51*. *Vide my book 228*.

But if defendant pleads *before the motion*, the court will not change the *venue*. *Coflar v. Standen. Cooke's Rep. 112*. So in *K. B. Str. 858*.

If plea be put in, the *venue* may be changed without drawing the plea, and pleading *de novo*.

The defendants having put in their plea, after a rule to shew cause why the *venue* should not be changed, and before it was made absolute, the court held, that the putting in the plea by inadvertency was no waiver of the rule, and gave the defendants leave to withdraw their plea on payment of costs, and made the rule for changing the *venue* absolute. *Barnes 492. Herbert v. Flowers*.

May move to change the *venue* the last day of term.

If the declaration be delivered so late that the defendant cannot move *before the last day* of the term, he may move it then. *Barnes 489. Hayward v. Wells*.

After plea, *venue* cannot be changed.

In an action against the proprietors of a stage coach from *Leeds* to *London*. *Venue* laid in *London*. The declaration was delivered the 1st of *May* 1793 to plead in eight days. An order was obtained for time to plead, which expired the 17th of *May*: on that day, a plea was delivered of the general issue. On the 22d a summons to change the *venue* to *York*, which was continued till the 24th, on which day it was attended, and Mr. *J. Gould* refused an order; on which the issue was delivered, with notice of trial for the first sittings in *Trinity Term*. On the first day of *Trinity Term*, 31st of *May*, motion was made to change the *venue* into *Yorkshire*. Court, on shewing cause, refused the motion, a plea having been

been delivered before the application. *Pallister v. Willan. Trin. 33 Geo. 3.*

How to move to change the Venue.

No notice is necessary to be given to the plaintiff's attorney, previous to the motion to change the venue, but the client makes the following affidavit; which give to a serjeant, with 10s. 6d. for him to move for that purpose; the rule is not absolute in the first instance, therefore in the evening draw up a rule, pay for same, 5s. inspecting the declaration, 1s. filing affidavit, if sworn in the country, 2s. serve it on plaintiff's attorney, and shew the original; which being done, make affidavit of such service, "and shewing the original rule," give it to a serjeant on the day of shewing cause, with a fee to make it absolute, fee 1l. 1s.; when done, draw up the absolute rule, and serve it, pay 4s. 6d. the plaintiff's attorney then will call, and alter the declaration, though I think the rule itself is sufficient to warrant the alteration in the issue. So in the K. B.

How to move to change the venue.

After the venue is changed, the defendant must plead as he should have done before without delay. So in the K. B.

In the C. P. } *John Denn, Plaintiff,*
and
} *Richard Fenn, Defendant.*

Richard Fenn, of Bread-street, London, factor, Affidavit.
the above defendant, maketh oath and saith, That the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B. as laid in the declaration, or elsewhere out of the county of A.

The affidavit must be positive, and not to defendant's knowledge and belief. *Belshaw v. Porter. Barnes 478.* If there be more defendants than one, one may make the affidavit.

If the defendant wants to change the venue in vacation, he may, upon producing the usual affidavit, obtain

How to change the venue in vacation.

obtain a judge's summons for that purpose; and on attendance, the judge will make an order for the rule, upon producing a serjeant's hand to a brief, fee 10s. 6d. pay for the order 2s. rule 4s. 6d. filing order 1s.; serve it on plaintiff's attorney.

Of bringing back the Venue by the Plaintiff.

Formerly it was required to give evidence in the county wherein the venue was retained, or be nonsuited.

But since bound only to give some evidence,

or be nonsuited.

Plaintiff must undertake if he maintains the venue to give material evidence.

An undertaking to give material evidence where the venue is laid may be supported by proof of the cause of action being in a foreign country.

Originally it was required, that the plaintiff should give no evidence at the trial, but what arose in the county wherein the venue was retained. 1 Keb. 189. 1 Sid. 442. If he gave none such, he must have been non-suited of course. But when it was laid down in *Swain's case*, 1 Sid. 405. that the plaintiff might lay his venue in any county wherein part of the cause of action arose, he was then bound only to give some evidence, and not the whole (*dare aliquam evidentiā*), in the county where the venue was laid. Salk. 669. 12 Mod. 515. which continues to be the rule at this day. And if the plaintiff fails to make good his undertaking, he is non-suited now, which has the same effect as judgment for the defendant in a plea in abatement, viz. *quod eat sine die*, and the plaintiff must begin again. 2 Black. Rep. 1031. *Santler v. Heard*. It is not enough to say, that the witnesses, to prove the contract, resided there. *Ibid*.

Rule to shew cause why the venue should not be changed from *London* to *Cornwall* on the usual affidavit. Cause shewed was, that the money was lent in *London*. The court held that plaintiff ought to undertake to give material evidence in *London*; which was undertaken and rule discharged. *French v. Coppinger*, 1 H. Black. Rep. 216.

Rule to change the venue from *London* to *Cornwall*, cause shewed was, that the cause of action arose at *Port L'Orient*, in *France*, which prevented an undertaking to give material evidence at any place in *England*. The court suggested whether an undertaking to give material evidence in *London* would not be fulfilled by proving the cause of action

tion at Port *L'Orient*, by the same sort of fiction as is used in a declaration, in which the cause of action may be laid in a foreign country, to wit, at *London*, &c. *Lord Loughborough* said, as the introducing a new method of practice might cause confusion, the plaintiff must undertake to give material evidence in *London*, and leave it to be considered at the trial, or afterwards by the court, how far evidence of the cause of action at Port *L'Orient* might, by fiction of law, support such an undertaking. Rule discharged, on undertaking to give material evidence in *London*. *Gerard v. Robeck*. Cause was tried, found for plaintiff, and court were of opinion, that the undertaking was, by fiction of law, well supported by proof of the debt in *France*. 1 *H. Black. Rep.* 280.

Motion to change the venue from *London* to *Suffolk*, an affidavit was made by the plaintiff, that the cause of action arose at *Dunkirk*, and not in *Suffolk*. Court held, that the cause shewn was not sufficient, unless the party had undertaken to give material evidence in *London*. *Woolnough v. Boys*. *M. T.* 26 *Geo.* 3. cited 1 *H. Black. Rep.* 280.

The venue in the K B. was brought back after two trials, on plaintiff's undertaking to give material evidence in *London*. *Cowp.* 409. So the plaintiff must move to discharge the rule on undertaking to give material evidence before replication. *Str.* 858.

Where a rule is made to change the venue, and afterwards the plaintiff would bring it back again, the rule must be, *dare aliquam evidentiam de materia in exitu*, in the county where the action was brought. *Salk.* 669. *Vide my Instr. Cl. K. B.* 5 ed. 229. for the determination in that court.

If after rule to change, the plaintiff undertakes to bring venue back, must give evidence of some matter in that county.

Rule to Plead.

THE rule to plead is the order of the court, and may be entered at any time after declaration delivered or filed in term, or within *four days after term*: and *Sunday* is a day within this rule, unless it be the first or last. Antiently there were two rules to plead given of four days each; the first, *ad respondendum*; the second, *ad respondendum peremptorie*, 2 Salk. 517. which were afterwards converted into one eight-day rule; but now four days *inclusive*. Vide 2 Str. 1192. The rule to plead cannot be entered on a *Sunday*, or on the *Purification*, *Ascension-day*, or *Midsummer-day*.

Before a plea can be compelled, or a plaintiff become intitled to judgment for want of it, a rule to plead must be entered with the secondary, which expires in *four days*; and if the defendant has appeared or filed special bail, a demand of a plea is also necessary upon the attorney who has appeared or filed special bail: but if a judge gives time to plead on a summons, a rule to plead is not necessary. *Dawson v. Garth. Cooke's Rep. 141.*

There must be a new rule to plead given, if the defendant do not plead before the subsequent term, to that wherein the former rule was given, to warrant a judgment, or intitle the plaintiff to a plea of the such subsequent term, unless there has been a rule of court, or a judge's order obtained, or an injunction.

The rule is given by delivering a slip of paper to the secondary, with the title of the cause, in this form:

Denn v. Fenn. }	Rules to plead.
Doe v. Roe. }	A. K. Attorney.
6th November 1793.	

Which take to the secondaries office, Mr. Skinn, pay him for the entry 1s. 10d. each (1s. 6d. for the stamp,

stamp, and 4d. for the entry in his book); the rule expires in four days, *inclusive of the day whereon it is given*. But judgment may not be signed till the afternoon of the next day. The secondary will accept the rule on the *essoign day*, but he cannot enter it till the *first day* of the term. *Cooke's Rep.* 68. *Seller v. Facely*.

Sunday, or any holiday, on which the court *does not sit*, is reckoned a day within the rule, *except it happens to be the first or last of the four days*. Sunday or any holiday, &c. no day.

After an order for an imparlance, a fresh rule is to be given. When new rule to be given.

If four terms are elapsed after declaration delivered, the defendant must have a whole term's notice to plead, (*unless the cause is stayed by injunction or privilege*;) and in this case you give defendant's attorney notice before the *essoign day of the term*, that you intend to proceed in the cause, "by giving a rule to plead," and the day after the term is ended give your rule. When a term's rule must be given.

Where there has been a rule to plead given, and afterwards an injunction served, in case the plaintiff be delayed in his suit at law for two terms after, no new rule to plead is necessary, but after injunction dissolved he may sign judgment; otherwise when the plaintiff delays himself. *Theedam v. Jackson. Barnes* 238. *Pract. Reg.* 26. S. C. No rule if injunction.

It is settled that if a judge gives time to plead till the first day of the subsequent term, when the time is expired, the plaintiff in default of a plea may sign judgment without giving a new rule to plead. When time to plead is given, no new rule. *Taylor v. Stockham. Pract. Reg.* 290. S. C. *Barnes* 243.

In this court if plaintiff amend his declaration after rule to plead given, he must enter a new rule to plead. *Blunt v. Morris. 2 Black. Rep.* 785, otherwise in K. B. *N. on R. M. 10 Geo. 2. 2 Salk.* 517. On amend. new rule.

Demand of Plea.

THE demand of plea is notice in writing from the plaintiff's attorney; and where special or common bail is filed by the defendant *in due time*, there must be a demand of plea made before the plaintiff can sign judgment. If defendant be under a judge's order for time to plead, a demand of the plea is not necessary. *Taylor v. King. Hil. 31 Geo. 3.*

A demand of plea indorsed on the back of declaration, bad.

A demand of plea, indorsed on the back of declaration, held irregular, and judgment set aside; for it must be made after declaration delivered, and rule to plead given. *Barnes 276. Eames v. Jew. So in the K. B.*

A demand of plea.

In the Common Pleas.

Denn v. Fenn.

The plaintiff demands a plea in this cause, otherwise judgment.

Yours, &c.

Mr. J. B. Attorney for
the Defendant.

J. K. Attorney for
Plaintiff.

How long to plead after demand made.

Court declared that for the future no judgment should be signed *till the opening of the office the next day in the afternoon, after proper demand made in writing of the plea*, for want of which such judgment shall be signed. *Buckmaster v. Troughton. Cooke's Rep. 18.* But in the K. B. it is otherwise. For judgment there cannot be signed, *until twenty-four hours after the demand of plea*, although the time to plead be expired. *1 Term Rep. 454. 4 Term Rep. 118.* The practice is much the better in C. P.; and before the above determination I always understood the practice to be the same in the K. B. as in C. P.

King's Bench practice.

If defendant be beyond sea, and his attorney dead.

A defendant being beyond sea and his attorney dead, a rule was made absolute that demand of a plea

plea in the office should be sufficient. This was made on affidavit of service of a rule to shew cause on one of defendant's bail, and that the other was not to be found. *Barn. 307. Bailey v. Semple.*

The rule must be expired before judgment can be signed, though the demand of plea be previous to the expiration.

The demand of a plea before bail is justified, is a waiver of justification; therefore take care bail is complete before such time as you demand the plea.

Demand of a plea waiver of the bail, unless perfected.

It should be given to the agent in town, and not to the country attorney, for a plea delivered in the country is irregular. *Barnes 251. Taylor v. Lawson*, unless there be no agent in town. *Pract. Reg. 281.*

To be given in town to the agent.

If defendant be in custody of the warden, no demand of plea is necessary, nor in custody of a sheriff or other goaler in this court. But the K. B. determine that a demand is necessary if in custody of the marshal, but not if in custody of a sheriff, &c. *1 Term Rep. 591. K. B.*

If in custody no demand necessary in C. P. in K. B. how the variance.

Where a judgment by default has been set aside, and rule is conditionally to plead issuably, rejoin gratis, &c. a demand of plea is not necessary. *King v. Taylor. Hil. 31 Geo. 3.*

When not necessary.

Of obtaining Time to plead.

If the defendant be not ready to plead by the expiration of the time allowed him for that purpose, his attorney or agent having put in bail or filed an appearance, may obtain a summons from a judge (but it must be a day previous to the expiration of the time) to shew cause why the defendant should not have a week's time to plead; pay in term or vacation 2s.; serve plaintiff's attorney with a copy, attend thereon; and if the cause is to be tried in *London* or *Middlesex*, and the plaintiff be in time to try his cause, the judge will grant an order

on

on terms of *pleading issuably, rejoining gratis, and taking short notice of trial for the last sittings within term, or the sittings after term*, provided a consent is given to let him take judgment as of the term; if he should not be in time, then on the terms of *pleading issuably only*.

Summons after rule to plead expired is no stay.

After rule to plead expired, defendant obtained and served a judge's summons for time; plaintiff signed judgment, which was held regular: for a summons *after the rule is expired*, is not a super-sedeas or stay of proceedings. *Ottiwell v. D'Aeth. Barnes 254.*

Time is inclusive of date of order, but exclusive of day of expiration.

Judge's order, dated 28th of *April, Sat.* for a week's time to plead. *Sat. 5th of May*, in the afternoon, judgment was signed. Officers of court certified this practice to be, that the time was reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day when it expired; therefore the judgment was held regular. *Kay v. Whitehead. 2 Black. Rep. 35. Gould, J. cited. Read v. Montgomery. E. 26 Geo. 3.* Order, dated 16th of *May*, for a week, judgment signed 23d, held to be regular.

If a summons be taken out in time for pleading, and defendant's attorney does not attend before plaintiff can sign judgment, he must get the summons discharged first. *Rivers and others v. Plumlee. Barn. 240. Cooke's Rep. 144. Brown v. Godfrey.* The King's Bench differ in this.

Half an hour's attendance.

Attendance on a judge's summons for half an hour, next immediately following the return thereof, is sufficient. *Not. E. T. 23 Geo. 3.* formerly was an hour; and defendant's attorney must be exact to his time in attendance on the summons.

The plaintiff's attorney must stay till the third summons before an order can be made. But if default should be made by him, then an affidavit of the service of the three summonses, and the due attendance on each, the judge will make his order *ex parte*.

A month's

A month's time to plead is a lunar month, or four weeks, and not a calendar month. 3 Burr. 1455. The order must be drawn up and served. Month's time, what.

Where the defendant is an *executor* or *administrator*, the order will be for him not to plead any judgment confessed, since the time for pleading was out. 8 Mod. 308. for otherwise he might confess judgments in the mean time, and plead them in bar to the plaintiff's demand. 1 Bulstr. 122. So determined on shewing cause in *King v. Goodall*, E. 31 Geo. 3. why *plene adm.* and a judgment recovered should not be pleaded, confessed after rule to plead expired. Executor's defendant.

What is a Plea within the meaning of an Order.

When the defendant is under a judge's order to plead issuably, and pleads a plea which is not issuable, the plaintiff may consider it as a *mere nullity*, and sign judgment.

Therefore a plea that the plaintiff was an infant, and ought to sue by *prochein amy*, *Barnes* 263. *Wagstaffe v. Long*; a recovery in another court, 3 Wils. 33. *Cave v. Aaron*; nor a general performance of covenants not signed by counsel, *Barn.* 354. *Thompson v. Atkinson*; or in abatement; cannot be pleaded after such order. But the King's Bench have held a plea of *stat. 23 H. 6. c. 10.* against sheriffs taking bonds *ex colore officii* to be an issuable plea, 1 Burr. 605. In both courts the statute of limitations may be pleaded, 3 Term Rep. K. B. 124. If one out of several pleas be not issuable, judgment may be signed. *Vide* 3 Term Rep. K. B. 305.

A plea of tender is an issuable plea, and so held by both courts, E. T. 30 Geo. 3. *Noon v. Smith.* 1 H. Black. Rep. 369. 1 Burr. 59. and may be pleaded after a judge's order. Tender.

A frivolous demurrer is not within the meaning of the order; yet if it is apparently meant to try the merits of the cause, it is a good issuable plea, *viz.* Frivolous demurrer.

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Imparlarice.

an issue in law, though not in fact. *Wright v. Russell*, 2 Black. Rep. 923. Same in the King's Bench, 3 Burr. 1788. *Gray v. Ashton*.

Imparlarice.

There are three sorts of Imparlarice: 1. *A common imparlarice, which is entered of course.* 2. *A special imparlarice, which is granted by the prothonotary.* 3. *A general special imparlarice (saving all manner of exceptions, and, among the rest, the exception to the jurisdiction).*

When defendant
entitled to an
imparlarice.

Where the writ is returnable the *first, second, or third return* of the term, if the declaration be not filed, and also notice of filing given before the last *four days* of the term, in which the writ is returnable, defendant is entitled to an imparlarice of course; and if returnable on the last return, defendant is also entitled to an imparlarice.

If the writ be returnable in *Michaelmas term*, and plaintiff does not deliver or file his declaration before the *essoign day* of *Hilary*, the defendant is entitled to an imparlarice.

Special impar-
larice.

If the defendant pleads in abatement in a subsequent term, a special imparlarice must be procured within the *first four days*, which the prothonotary grants of course, if the defendant is entitled. *Pract. Reg.* 1. *Thelkeld v. Goodfellow. Barnes* 224. S. C.

If defendant be entitled to an imparlarice, and he demur to the declaration, it is a waiver of the imparlarice.

Every dilatory plea is held strictly to certain rules. They must be offered in the first instance, and pleaded without any repugnancy. They cannot be pleaded after a general imparlarice, because, when you ask a favour and gain time, you admit all before to be right. To avoid the injustice that might sometimes happen by adhering too strictly to this rule, two special manners of imparlarice are allowed; there being three kinds of imparlarices in all.

all. The first sort of special imparlances, save to the defendant the right of excepting to the suit and count, and these are granted of course upon application at the office. The other sort of special imparlances, (which saves all manner of exceptions, and, among the rest, the exception to jurisdiction,) is discretionary. It must depend upon particular circumstances, which are left to the decision of the court. *Lutw.* 46. *Wentworth and Squib.* 12 *Mod.* 529. decisive. *Grant. v. Lord Sondes.* 2 *Black. Rep.* 1094.

A plea to the jurisdiction of the court cannot be pleaded, *after an appearance by attorney.* *ibid.*

The imparlance, if any must be, such as suits the nature of the case.

Searching for Plea.

To be searched for at the prothonotary's office Searching for in *Tanfield Court, Temple* (who keeps a book for that plea. purpose), by the defendant's name. If no plea there, and none is delivered to plaintiff's attorney in due time, sign judgment; the form of which you will find under title *Judgment by Default.*

Pleas in Abatement when to be pleaded.

Restrictions.

AS pleas in abatement enter not in to the merits of the cause, but are dilatory, the law has laid the following restrictions on them: First, By the statute 4 Ann. c. 16. “No dilatory plea is to be received unless on oath, and probable cause shewn to the court.” 2. No plea in abatement shall be received after a respondeas ouster; for then they would be pleaded in infinitum. 2 Saund. 41. 3dly, That they are to be pleaded before imparlance (except where the declaration is delivered so late, that the rule cannot be given, or where the defendant is intitled to one). 4thly, That when issue is joined on them, if found against the defendant, they shall be peremptory, 2 Show. 42. 6 Mod. 236.; and the judgment shall be *quod recuperet*, because the defendant chusing to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admittance that he had no other defence. 10 Mod. 112. Str. 532. 2 Wils. 367. *Eichorne v. Le Maitre*.

No advantage can be taken of the declaration.

On a plea in abatement no advantage can be taken of the declaration, nor after the plea, *Carth.* 172. for nothing but the writ is then in question, for nothing else is pleaded to. *Carth.* 172. 3 *Lev.* 37; nor in such pleas which relate to the person there is no necessity of laying a venue, for all such pleas are to be tried where the action is laid. *Salk.* 4. pl. 14. *Carth.* 363. 12 *Mod.* 125.

Cannot be pleaded before defendant appears.

A plea in abatement cannot be pleaded before the defendant is in court, because he does not answer to the process of the court, which formerly was returned and read at the bar. If he appeared, the *Counter* read the writ to the court in his presence, and he was to plead thereto in four days, unless special

special leave was given by the court; because the person coming in by the process of the court ought not to have time to delay the plaintiff. *Gib. H. C. P. 52.*

To all declarations where the defendant is to plead the same term, the defendant may plead in abatement within four days after declaration delivered; but in such case after the four days, no such plea shall be accepted, though no rule to plead be given. *Anon. Cooke's Rep. 23. 63.* So in *K. B. N. on R. E. 5 Ann.* And before such plea be pleaded, the declaration must be taken out of the office, or the plaintiff may sign judgment. So in *K. B. R. M. 10 Geo. 2. Reg. 3.*

Must be pleaded in four days though no rule inclusive.

But where the declaration is delivered or filed so late in term, that the defendant is not obliged to plead in the same term, he must apply to the prothonotary for a special imparlance within the first four days in the succeeding term, or he cannot plead in abatement. *Cooke's Rep. 78. Threlkeld v. Goodfellow. Barnes 334. Napper v. Biddle.*

But if filed so late in term, &c.

If a declaration be delivered the 16th, the plea must be delivered or filed the 19th. *Vide Cooke's Rep. 64. Biddleston v. Atcherley.*

Both days are held to be inclusive in both courts, whether rule to plead be given or not. *Vide 1 Term Rep. K. B. 277. 690. 5 Term Rep. 210.*

Both days inclusive.

But if the last of those four days happen on a Sunday, the defendant has all the next day. So in both courts. *Vide 3 Term Rep. K. B. 642.* If declaration be delivered the 17th Feb. the plea must be delivered or filed the 20th.

By *Stat. 4 & 5 Ann. c. 16.* "No dilatory plea shall be received, unless the party, by affidavit, prove the truth thereof, or shew some probable matter to induce the court to believe that it is true."

No plea without affidavit.

It must be signed by a serjeant; and without an affidavit of the truth thereof annexed, judgment may be signed, as if no such plea had been delivered or filed. So in *K. B.*

Must be signed by a serjeant.

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There must be an affidavit to a plea to the jurisdiction.

Per Cur. An affidavit is necessary wherever you plead to the jurisdiction: The lands may be parcel of the manor itself, which is antient demesne, and such lands are pleadable at common law; but if they are lands held of a manor which is antient demesne, then they are not pleadable at common law. In this case the tenant pleaded antient demesne without affidavit. The demandant moved for and had a peremptory rule to plead, motion to discharge it, which peremptory rule court ordered to stand. *Hatch v. Cannon.* 3 *Wilson* 51. *Vide Pract. Reg. C. P.* 2. *Smith v. Roe.* 2 *Barnes* 151. Application must be made to plead antient demesne within the four days. *Barnes* 187.

What affidavit must shew to plead antient demesne.

And it seems from authorities, 1 *Salk.* 217. *Carth.* 220. 1 *Show.* 386. leave must be asked of the court to plead it; and the affidavit should shew that the lands are holden in antient demesne, and holden of a manor, which manor is holden in antient demesne; and that there are suitors in the manor court, and that the lessor has a freehold. *Doe ex dem. Rust v. Roe.* 2 *Burr.* 1046. This affidavit was, that the land were holden in antient demesne, that they were holden of the manor of Godmanchester, and that there was a court of antient demesne in the borough of Godmanchester, held not sufficient: if he be seised of a term, he cannot sue there.

Cannot plead two dilatory pleas.

A defendant cannot plead two dilatory pleas, nor will the court suffer a plea in abatement to be amended; and if the plea be true, the plaintiff may enter *nil capiat per breve*, without paying of costs. 1 *Barnes* 92. 190. *Cooke's Rep.* 29. *Dockrey v. Lawrence.*

Pleas in abatement.

All pleas in abatement (unless to the jurisdiction and privilege) may be pleaded after a special imparlance. *Gilb. C. P.* 184.

Plaintiff may now summon to amend.

If the defendant plead in abatement of his surname or christian name, plaintiff may now have a summons to amend his declaration on payment of costs, which saves the entry of a *cassetur breve*. So in both courts. *Vide my 5 edit.* 242.

Claiming Conusance.

There are no pleas to the jurisdiction of the courts at *Westminster* in transitory actions, unless the plaintiff by his declaration shews the cause of action accrued within the county palatine, or if it be between the scholars of *Oxford* and *Cambridge*. Nor in local actions, unless within those jurisdictions where *breve domini regis non currit*. *Co. Inst.* 213. 1 *Sid.* 103. For where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at *Westminster* intrench on their privileges, they must demand conusance; that is, that the cause may be determined before them; for the defendant cannot plead it to the jurisdiction, because a defendant is arrested by the king's writ; but within a franchise where the king's writ doth not run, he is not legally convened, and therefore may plead it to the jurisdiction; but the creating a mere franchise does not hinder the writ from having the same jurisdiction over the cause, but grants jurisdiction to the lord of the liberty; and whenever the king's courts intrench on his jurisdiction, he may make his claim, and demand that the cause be determined before him. 4 *Inst.* 224. *Gilb. Com. P.* 191. No court can demand conusance unless it be of record. *Co. Lit.* 117. b. They have conusance of local actions. Counties palatine, if transitory actions are laid there, have conusance. If it be between the scholars of *Oxford* and *Cambridge* in a transitory action, the university shall have conusance. 1 *Sid.* 103. And where a franchise cannot give a remedy, and there would be a failure of justice, it shall not have conusance, although the action accrued within their jurisdiction. *Gilb. C. P.* 193.

It must be demanded before imparlance, and the same term the defendant appears; otherwise there would be a delay of justice. 1 *Sid.* 103. After plea pleaded, claim was disallowed. *Barn.* 346.

When conusance
to be demanded,

Entered upon
record.

Str. 810.

1 Ld. Ray. 427.

The claim is a demand of something *quod sibi debetur*; the consequence whereof is, that it must be perfectly entered upon record, must state every thing to take away the general jurisdiction of the court, it may be demurred to, or the facts therein alledged may be controverted by pleading; the whole ought to be set forth with all the proceedings in the cause that have been with great precision. It is necessary to set forth the declaration in the entry of the record of the claim on the roll; and on the same roll the entry of claim of consuance thus:

Entry.

And the said defendant by *A. B.* his attorney comes (but the defendant says no more); and hereupon comes *George Henry* earl of *Litchfield*, chancellor of the fair university of *Oxford*, by *C. D.* his attorney, to demand, claim, prosecute, and defend his liberties and privileges thereof; that is to say, to have consuance of the plea aforesaid; (and so the whole claim is entered in due form to the end thereof, which concludes thus;) and the aforesaid chancellor demands his liberties and privileges aforesaid according to the form and effect of the letters patent aforesaid, and the confirmation aforesaid, in this place between the parties aforesaid here in the court of the lord the king now depending to be allowed to him as heretofore hath been allowed. *Chaplyn v. Wilsb. Trin. 3 & 4 Geo. 2. Roll. 356. C. B.* is a precedent. *Leasingby v. Smith. 2 Wils. 406.*

Consuance denied,

21st Jan. 1769, a *capias* issued ret. on the morrow of the *Purification*, to answer plaintiff *de placito quare clausum fregit* at *Oxford* 3d Feb. and served on defendant, who entered his appearance the 6th Feb.—3d April declaration delivered in assumpsit for work done.—12th April, the first day of *E. T.* a rule to plead was given; the 14th application to the court by the attorney of the chancellor of *Oxford* claiming consuance, and praying same might be allowed; rule to shew cause. The court were of opinion the claim came too late, for the claim might have been entered

tered as of *Hilary* term; and the *first day of Easter* term, the court might have been moved to have had it allowed. And the court said, that the books shew that the conuſance of pleas muſt be demanded the *first day* the party hath in court, even upon the *return day* of the writ, if the *cause of action* appears therein; if it doth not, then upon the *first day* given in the declaration; in the present case it appears by affidavits, that the defendant had notice of the cause of action *before the return of the capias*, so that the chancellor ought to have come and made the claim upon *the return of the writ*. *ibid.* 413. Claim disallowed.

5 Burr. 2823

Claim of conuſance refused to the university, the party (though a member) not being resident at *Oxford*. *Hayes v. Long*, Cl. 2 Wils. 310.

Refused.

The claim must be verified by affidavit. *ibid.* 312. *per Bathurst, J.*

Affidavit.

The return of the original writ in trespass, where place is named, or *præcipe quod reddat*, where land is demanded, may be the *first* instance; because in these cases the writ tells, *where the cause of action arises*. But in *debt* or *detinue* it is otherwise: for it is not known where the contract or obligation was made; and therefore till the plaintiff has counted, the claim needs not to be made. So in *replevin*, if it be between strangers. If sued against the lord of the franchise himself, there the lord's claim would come too late, after the count; because the law intends he knew where the taking was made, being himself a party. Two conclusions follow: *First*, That before any person is bound to claim conuſance, he is intended by law to have had some legal notice of his franchise being intrenched upon; and therefore it is said to be named *conuſance*. *Secondly*, That in order to bar him from making the claim, there ought to be some laches or default in him; and a time shewn when he might have claimed it sooner after such legal notice. *Ld. Mansfield. Rex v. Agar.* 3 Burr. 2823.

The King's Bench.

Demanding Oyer.

Where a deed,
&c. must be
shewn, or else
no judgment.

BY *Rule Mich. 1654, sect. 15.* "That when a deed, will, or letters of administration, are to be shewn in a declaration, the attorney of the plaintiff delivering a declaration with a subscription, that the defendant shall not be compelled to plead till the same be shewn, no judgment by *nihil dicit* to be entered against the defendant till the same shewn; nor any nonsuit upon the plaintiff, if he shew the same before the end of the next term."

If the action be
on bond, &c.
defendant may
demand oyer.

If the action be on a bond, deed, or other specialty, the defendant may demand oyer of the same; and he shall have as *many days to plead after oyer given, as he had to plead at the time oyer was demanded.* *Barnes 238. Theedam v. Jackson. Simpson v. Daffield 254.* So in K. B. R. T. 5 & 6 Geo. 2. 1 Str. 705.

If he demand oyer of the obligation, he shall not have oyer of the condition, unless he demands that also. So of an indenture which refers to matters indorsed, he must demand oyer of both. *Mod. Caf. 237.* Oyer shall contain the names of the witnesses and all memorandums on the bond. *Barnes 263.* and is entitled to inspect the bond. *ibid.*

The defendant
shall have the
same time after
oyer given, as
was unexpired
when oyer de-
manded.

Rule to plead was given on *Monday* the 24th of *October*, and was out the *Thursday* after; oyer was demanded on the *Wednesday*, and given on the *Thursday*, and judgment was signed on the *Friday* in the afternoon. *Curia.* The plaintiff's attorney should have stayed and not signed it till *Saturday* in the afternoon, for the defendant shall have the same time to plead after oyer given, as he had when oyer was demanded. *Simpson v. Daffield. Cooke's Rep. 143.*

Oyer must be
demanded before
the time for
pleading expires.

By a judge's order defendant was allowed two days' time to plead, which expired the 30th of *May*.
On

On the day following, oyer of the bail-bond was demanded. Plaintiff signed judgment and held regular. But the court seemed to think that it was reasonable oyer might be demanded any time before judgment, but would not overturn the established practice. *Barber assignee, v. Satchewell. Barnes 326. Cooke's Rep. 73. Pract. Reg. 299.*

It was antiently demanded in court, but now made by one attorney of the other. *Mod. Caf. 28.*

Debt upon bond, after rule to plead out, motion, to plead two pleas. Performance of the condition. *The like case,*

2. That no letters of administration ever were granted as set forth. *Objection,* That defendant cannot plead the second plea, without craving oyer of the letters of administration, and setting same out; and he not having craved oyer thereof in time, it is now too late to demand it, because *the rule to plead is out,* and of that opinion was the court. *Rule disch. Garrard Adm. v. Earley. 2 Wils. 413. Cooke's Rep. 96. Hartly v. Varny.*

Buller, J. It is within time if craved before the rule to plead is out. *2 Term Rep. 150. K. B.*

The 12th of November defendant pleaded a release, with a *profert hic in curia*; same day the plaintiff demanded oyer, and on the 14th signed judgment in the afternoon, for want of oyer. *Cur.* Within what time defendant ought to deliver oyer of a deed pleaded by him,

That in case a defendant pleads with a *profert*, and oyer is demanded, and not given in a reasonable time, the plaintiff may sign his judgment, it being esteemed as no plea till verified by oyer; and they held the judgment to be regular. *Blaxland v. Burgess. Cooke's Rep. 95.* Court said from the 12th to the 14th was a reasonable time. *Pract. Reg. 300. S. C. Barnes 245. S. C.*

Declarations, pleas, replications, and other pleadings, and also oyer of writs, bonds, and other deeds, shall be demanded by a note in writing. Note fixed in the office. *Mich. 1 Geo. 2.* Demands, &c. to be in writing.

N. B. The defendant cannot now have oyer of an original, because the defendant comes in upon original.

mesne procefs, as the *capias*, &c. and there is no original writ issued out at the beginning of the suit as there used to be. *Salk.* 701. *Barnes* 340. *Ford v. Burnham.* 2 *Wils.* 395. *Hole v. Finch.*

King's Bench
altered their
practice same,

Lord Mansfield. The practice for defendants to pray oyer of the original is not warranted by any rule or principle of justice. That it is incumbent on the court to make their proceedings as little dilatory, oppressive, and expensive, as possible. That it is unnecessary for the defendant to see the original after he has been informed by the declaration of the cause of action. That the court of Common Pleas has rejected the practice; and that from henceforth plaintiffs in this court may proceed, as if such demand of oyer had not been made. *T. T.* 19 *Geo.* 3. 1779. *Boats v. Edwards.* *Dougl.* 227.

In the Common Pleas.

Denn v. Fenn.

The demand,

The defendant demands oyer and copy of the writing obligatory in the declaration mentioned, and of the condition thereof.

Yours,

To Mr. C. D. Attorney
for the Plaintiff.

J. K. Attorney for
the Defendant.

How oyer is to
be given.

The defendant must pay for oyer and copy, 4*d.* per sheet, or the plaintiff may sign judgment; and it is given on plain paper. *Theedam v. Jackson.* *Barnes* 238. So he must for oyer of an indenture. *ibid.*

Oyer of a record
need not set it
forth.

Where the defendant has oyer given him of a record, which is set out in the declaration, he need not set it forth in his plea. 1 *Wils.* 97. *Simmons v. Parmenter et al.*

Seldom sets forth
the whole.

When oyer of a bond is demanded, the defendant, when he comes to plead, seldom sets forth the whole bond, but the obligation or condition, or so much thereof as makes for his purpose.

Common

Common Pleas.

Denn v. Fenn.

The plaintiff demands oyer, and copy of the deed mentioned in the plea of the defendant.

Demand of oyer
of deed in the
plea.

Yours, &c.

J. K. Attorney.

The defendant has two days in which to give oyer and copy of the deed. *Barnes* 245. So in King's Bench, 2 *Term Rep.* 40.; and the party of whom oyer is demanded must carry it to the opposite party. Mr. J. *Asbhurst* says, both days are exclusive. *Ibid.*

Two days to give
oyer.

Pleas in Bar.

When to be pleaded.

Town causes,

ON all process returnable the *first, second, or third return* of any term, if the defendant lives within *twenty miles of London*, the defendant shall plead within *four days*. *R. Trin. 8 Geo. 3.*

Country.

And in case the plaintiff declares in any other county, or the defendant lives above twenty miles from *London*, the defendant shall plead within eight days after declaration delivered with notice to plead, without imparlance. *ibid.*

Must be delivered four days before the end of the term.

But such declaration must be delivered *four days before the end of the term* in which the writ is returnable, *exclusive* of the day of delivery, so as to be intitled to such plea.

When an imparlance,

If the declaration be delivered on process returnable on any other return, the defendant is intitled to an imparlance of course; and need not plead till the first four days of the next term.

When need not plead until demand made.

If defendant files special bail, or enters an appearance, he need not plead until a demand is made on his attorney to plead; and where declaration has been regularly filed previous to bail being filed, or appearance entered, and not taken out of the office, yet there must be a demand.

Either to be delivered or filed.

Pleas are either to be delivered to the plaintiff's attorney, or filed with the prothonotaries on a treble penny stamp paper, and the general issue must be delivered or filed at full length. *Barnes 239. Martyn v. Skinner.* And must be pleaded in the name of an attorney of this court. *Barnes 259. Turner v. Williams.* If you file the general issue, pay 2s. if a special plea, 8d. *per sheet*; if delivered to plaintiff's attorney, pay nothing.

Formerly affidavit of necessity of pleading double.

Formerly this court expected to be satisfied by affidavit of the necessity of pleading several pleas; but since have been led to think that they have been

too nice in the construction of the act for pleading double, which seems to be general, and a remedial law. *Barnes* 347. *Steele v. Pindar*. And therefore now it is done upon motion to the court, who are to judge of the propriety thereof; and the defendant may move to plead any number of pleas, provided no two of them be inconsistent with each other.

Now without.

But they will not suffer incompatible pleas to be pleaded, as *non assumpsit* and a tender, 2 *Black. Rep.* 723. *Dougal v. Bowman*. It only serves to lengthen the record, for it always concludes with a *non assumpsit* as to the residue of the demand; or *non est factum*, and *solvit post diem*, *ibid.* 905. *Fox v. Chandler*; or *non est factum* and *solvit ad diem*, *ibid.* 993. *Arnold v. Bias*; or *non assumpsit*, and alienage of plaintiff, *ibid.* 1326. *Feron v. Ladd*; or in dower, *ne unques seise*, and *ne unques accouple*, *ibid.* 1157. *Anderson v. Anderson*; *Hillier v. Fletcher* 1207, *non assumpsit*, and a release. *Barnes* 328. *Gibson v. Cole*; *non assumpsit* and infancy, *Barnes* 363. But *non est factum* and infancy have been allowed; *non est factum* and *solvit post diem* denied. *Barnes* 363. *Fox v. Mean*, not guilty, and that plaintiff became a bankrupt, *ibid.* 360. *Herbert v. Flower*, denied not guilty and a licence, *Barnes* 351. *Rolle v. Lytton*; because the place is ascertained by the declaration, and plaintiff may give the same evidence on the general issue as on both pleas. Not guilty and a release of a particular trespass, denied though they have admitted not guilty, and a general release where an affidavit was produced. *ibid.* 351. *Prinnel v. Preston*.

Incompatible
pleas not suf-
fered.

Where the pleas are contradictory, defendant should make appear, by affidavit, that it is necessary for his defence to insist upon both. *ibid.*

It is laid down that the following pleas do not require a serjeant's hand:

Non assumpsit,
Non cul,

Non est factum,
Nil debet,

Comperuit

Pleas in Bar.

<i>Comperuit et diem,</i>	<i>Per dures,</i> Cooke 41.
<i>Son assault demesne,</i>	<i>Solvit ad diem,</i>
<i>Plene administravit,</i>	<i>Ne unque executor,</i>
<i>Riens per descent,</i>	<i>Ne unque administrator,</i>
<i>Nul tiel record,</i>	<i>Infra ætatem,</i>
<i>Per minas,</i>	<i>Payment of rent in covenant,</i>

Cooke's Rep. 41. Barnes 365.

But on inquiry Mr. Gerrard, the late secondary, said, that the following pleas require a serjeant's hand.

<i>Son assault,</i>	<i>Per dures,</i>
<i>Plene administravit,</i>	<i>Infra ætatem,</i>
<i>Riens per descent,</i>	<i>Ne unque executor.</i>
<i>Per minas,</i>	

Because these pleas require special replications, *non assumpsit infra sex annos*, and a general performance of covenants require a serjeant's hand. *Cooke's Rep. 41. Upton v. Pullen. Barnes 354. Thomson v. Atkinson.* So does a recovery in the K. B. but replication does not. 2 *Black. Rep. 816. Hubert v. Lord Weymouth.*

Double Pleas.

Defendant may, with leave of the court, plead double.

Any defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record, with leave of the same court, may plead as many several matters, as he shall think necessary for his defence; provided, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue for the plaintiff, costs shall be also given in the like manner; unless the judge certify that the defendant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him. 4 *Ann. c. 16. s. 4.*

Constr. of the 2d.

The statute does not extend to *qui tam* actions; so that in them there can be but one plea. 2 *Will. 21. Law qui tam v. Crowther.* Nor to plead double matters which shall have different trials; for instance,

stance, in dower: If the defendant plead *ne unques accouple in loyal matrimonie, and a mortgage*. For the first matter shall be tried by the bishop, and the other by a jury; and the judge cannot certify if there was a probable cause. *Com. Rep.* 148. C. B.

The certificate may be made after the trial. *Barn.* 141.

Double pleas are all to be signed by a serjeant; and if delivered without a serjeant's hand, the plaintiff may sign judgment as if no plea had been delivered. *Pract. Reg. C. P.* 282.; and wherever the plea is signed by a serjeant, the replication must be likewise signed. *Barnes* 365. *Simpson v. Neale*.

Double pleas to be signed.

Pleas allowed on a serjeant's hand without a rule to shew cause, as settled by the late Mr. Gerrard.

Pleas allowed on a serjeant's hand in the first instance.

Non assumpsit, non assumpsit infra sex annos and a set-off. Non assumpsit, and a discharge under the insolvent act. Non cul and liberum tenementum. Solvit ad diem, and a mutual debt. Tender and a set-off. Non assumpsit and plene administravit generally or specially. Plene administravit and a set-off. Ne unque executor and plene administravit.. Non est factum and duresis. Non assumpsit and a release. Wright v. Gregory. Trin. 32 Geo. 3. Not guilty, son assault demesne, and moliter manus imposuit. Not guilty to the whole, and a tender of amend. General issue and infancy.

Give brief to a serjeant, take it to the secondary, who will draw up the rule, serve copy on the plaintiff's attorney and deliver the plea at the same time.

How to move.

This motion cannot be made till defendant has appeared, *Barnes* 331. and declaration should be taken out of the office.

How to plead Double:

If you plead double any other pleas, a motion must be made by a serjeant for that purpose to the court; pay him 10s. 6d.; draw up rule in the evening with the secondary, pay according to the length;

How to plead double in term.

length; serve copy on plaintiff's attorney, and shew him the original rule; then, on the day of shewing cause, give brief to a serjeant, with one guinea, first making an affidavit of the service of the rule annexed (add the words, "*and at the same time shewed him the original rule*"), and when made absolute, draw up rule at the secondaries, make a copy thereof, and annex it to the plea before it is filed or delivered; pay for rule according to the length. If you move to plead double, and pay money into court, these are *separate motions*.

If you are driven for time, the serjeant moves in the same motion for time, which will be granted on putting plaintiff in the same situation as he would have been.

King's Bench.

The practice in the King's Bench differs; they grant the motion to plead several matters in the first instance, and that by counsel's hand only.

How to get time to plead in town causes.

If the defendant is not in time to plead before the time expire, he may apply to a judge, who will grant him a summons for that purpose; pay 2s. in term and vacation; serve copy on plaintiff's attorney, who will indorse same; and if the action be in *London* or *Middlesex*, and there is not time to give full notice of trial after the time is expired, it must be upon terms, "*of pleading issuably, rejoining gratis, and taking short notice of trial for the last sittings in term, or after, as the case happens*;" and it is to be remembered, that no plea but an issuable one, can after an order obtained, be pleaded, therefore a plea that the *plaintiff was an infant, and ought to sue by prochein amy*, *Barnes* 263. *Wagstaffe v. Long*; a recovery in another court, 3 *Wils.* 33. *Cave v. Aaron*. 2 *Wils.* 117. *Lowfield v. Jackson*; nor a general performance of covenants not signed by counsel, *Barnes* 354. *Thomson v. Atkinson*; are not within the order.

What an issuable plea.

What is meant by an issuable plea, &c.

What is meant by an issuable plea is, a plea in chief upon which the plaintiff may take issue, *Barnes* 263. *Wagstaffe v. Long*; by rejoining *gratis*, is meant rejoining without the common four-

four-day rule, *Barnes* 271. *Maurice v. Engier*; and taking short notice of trial; short notice should be at least as much as is sufficient to countermand a notice, viz. 2 days. *Butler v. Johnson. Barnes* 301. In the K. B. at least four days before the commission day. *R. E. 30 Geo. 3. Vide my Instr. 5 edit. 315.*

Defendant had time to justify his bail, whereupon a rule was made that he should plead *issuably*, and *take short notice of trial for the last sitting within term*. Then defendant pleads a recovery in *B. R.* The court on motion made a rule to shew cause why plea should not be set aside, and why the defendant's attorney should not pay the costs of the application, which was afterwards made absolute. *Cave v. Aaron. 3 Wils. 33.*

Attorney fixed with costs for pleading a sham plea.

The statute of limitations has been held to be within the meaning of a judge's order. *Drinkwater v. Claridge. Hil. 27 Geo. 3.* So in *K. B. 3 Term Rep. 124.*

If it be a country cause, you obtain the like summons, on which an order will be made (if in time before the assizes) *pleading issuably only*: when a summons is indorsed, or attendance made on the judge, draw up order, pay 2s.; make copy thereof, and serve same on plaintiff's attorney.

Time to plead in country causes,

A month's time to plead, means a *lunar month*; and so in all proceedings a month means *four weeks*. *3 Burr. 1455.*

Month's time to plead, is a lunar month.

Defendant obtained an order for time to plead, pleading *issuably*, rejoining *gratis*, and taking short notice of trial within term: defendant pleaded accordingly, and plaintiff replied, and then defendant, instead of rejoining, demurred merely for delay; plaintiff not having time to set down the demurrer to be argued within term, signed judgment, which defendant moved to set aside; and on hearing counsel on both sides, the court considered the defendant's practice to be a mere trick, and therefore denied the motion, *Barnes* 271. *Maurice v. Engier.*

Demurrer to the replication for delay is not within the order.

The

Demurrer to the merits, is an issuable plea, within an order for time.

Judge's summons no stay, unless obtained prior to the time for pleading is out.

If defendant has had an order for time, may have another, if no delay.

How to apply to plead double in vacation.

The court held, that though a frivolous demurrer was not within the meaning of a judge's order to plead issuably, yet where it is apparently meant to try the merits of the cause, it is a good issuable plea, viz. an issue in law, though not of fact. *Wright v. Russel.* 2 Black. Rep. 923.

A judge's summons stays nothing, unless it be returnable before the judgment be regularly signed; and if judgment be regularly signed before the summons for time to plead is returnable, the court will not set it aside, especially if defendant has no merits. 2 Black. Rep. 954. *Calze v. Lord Littleton.* Cooke's Rep. 142. *Barnes* 240. 252. 254, 255. So in the K. B. *Say. Rep.* 165.

The defendant, although he has had one order, if more time can be given him, may have a second and third summons for that purpose; so that the plaintiff is not prevented from trying his cause in the usual time.

How in Vacation.

Get a judge's summons for leave to plead several matters (naming your pleas); serve copy on plaintiff's attorney, attend thereon; and if the judge sees they are proper, he will grant an order for the secondary to draw up the rule, pay 2s. on producing a serjeant's hand to a brief for that purpose, pay serjeant's fee, 10s. 6d.; take the order to the secondary's office, and he will give you a rule; make copy for plaintiff's attorney, and either annex it to the plea, or serve it; shew the original.

Within what Time to plead where there have been no Proceedings for four Terms in Law or Equity.

If four terms are elapsed after declaration delivered, the defendant shall have a whole term's notice to plead, before judgment can be entered against him, unless the cause have been staid by injunction or privilege. 2 Black. Rep. 784. So in K. B. 2 Burr. 660. *Dougl.* 71. In this case you give

give notice to defendant, or his attorney, *before the assign day of the term*, "that you intend to proceed the next term, by giving a rule to plead." The rule may be given the day after the last day of the term is expired, and demand plea; and if demand is necessary, and there be no plea, sign judgment in the usual time. *Vide* a particular case in my 5 edit. K. B. 238. and 2 Term Rep. K. B. 40.

Of withdrawing the Plea and pleading a-new.

The defendant pleaded the general issue, moved for leave to withdraw that plea, and plead same again *with the statute of limitations*, upon an affidavit made by the defendant's attorney, that at the time he was bound to plead he was not fully instructed by his client what to plead, he therefore pleaded this plea to prevent judgment. It was insisted, that the rule of both the courts, is to permit the defendant to withdraw a special plea, and plead the general issue, but not *vice versa*, which the court agreed to. *Cur.* It is a good maxim that the law will rather suffer a particular mischief, than a general inconvenience; general rules of practice must be strictly observed for the sake of certainty, or practisers will be negligent. Indeed, under very special circumstances, the court will permit a defendant to add a special plea, as in the case of *Wilkes v. Wood*, which was upon terms and waiving privilege of parliament, 2 *Wils.* 204, that special plea was allowed to try the real merits of the case, but the plea of *the statute of limitations* is not to be favoured, because it excludes the merits; the court gives leave to add a plea for the furtherance of justice, but to permit this plea of the statute, would not be so. *Rule discharged.* *Cox v. Rolt.* 2 *Wils.* 253.

The court refused to permit the defendant to add the plea of the statute of limitations, although attorney was not instructed.

Qu. if he had been surprised.

Debt for selling coals short in measure; plea a recovery in King's Bench for same offence; motion

If a sham plea be pleaded, court will not

permit defendant to withdraw it, and plead the general issue.

General issue withdrawn, and to plead a special justification.

But where defendant had pleaded a plea to the action in Trinity Term, refused in Hilary to withdraw it, and plead general issue,

tion to withdraw plea, and plead general issue, *Cur.* The defendant has delayed the plaintiff by this sham plea, he has produced no affidavit that he has merits, and deserves to pay the 50*l.* for pleading a sham plea. Rule discharged. *Ellis qui tam v. —. 2 Wilf. 369.*

Leave was given to withdraw the general issue, and plead a special justification upon terms, and waiving his privilege. *Wilkes esq. v. Wood. 2 Wilf. 204.* So is the practice in King's Bench, *Taylor v. Joddrell. 1 Wilf. 254.* putting plaintiff in same state. *Barnes 346.*

But if a special plea goes to the action, as a bond given in satisfaction, which was pleaded in Trinity term 1769; the court refused in Hilary term to let defendant withdraw the plea and plead the general issue, on plaintiff producing an affidavit that the only material witness was gone to the *West-Indies* since issue joined last term; though defendant's attorney pleaded the plea by mistake. And the court said, This motion has frequently been granted after replication in some cases; but here the plea goes to the action, and pleaded so long ago as last Trinity term, and the defendant has laid by all last Michaelmas term; and there is no reason to let the defendant withdraw this special plea, and plead the general issue. Rule discharged. *Freeman v. Jones. 2 Wilf. 391.*

Executors had pleaded *non ass.* and certain debts by speciality sufficient to cover the assets and *non assets ultra*; moved to withdraw the general issue. Court made rule absolute, on condition not to bring error and no costs. *Dearne v. Grimp, & al. ex. 2 Black. Rep. 1275.*

You may move to withdraw plea, and pay money into court, and replead the general issue, *Barn. 362.* and a set-off. So in King's Bench, *Sir. 1267. 1271.*

So

So you may move to withdraw a demurrer and plead general issue, so it be in time for the assizes. *Barnes* 337.

Of adding Pleas.

This court has given leave to withdraw former avowries, and plead the same again, with two more added; on payment of costs, (after issues joined twelve months,) plaintiff to be at liberty to plead in bar *de novo*, and to proceed to trial at the next assizes. *Browne v. James. Barn.* 362.

In the same book it is said, where a single plea has been pleaded, the court have refused to add another, *Barnes* 338. I think the first case is right, and agrees with the King's Bench. There the court held, that though two terms had elapsed since the plea delivered, yet there was no limited time for application to plead several pleas. *Waters v. Bovell. 1 Wils.* 223. After plea of tender, and the money paid into court, court will not give leave to withdraw it, and plead the general issue. *Barn.* 330.

Of abiding by the Plea.

You must always abide by the pleadings pleaded in this court; and they cannot be struck through as in the K. B. and plead another plea without leave.——But if a plea of satisfaction is pleaded, and the plaintiff delivers the issue with the *similiter*, you may strike out the *similiter* and demur to the replication.——But remember you must not pay for the issue, but return the issue with the *similiter* struck out forthwith, with a notice that you shall leave a demurrer in the office. Vide *Boon v. Eyre. 1 H. Black. Rep.* 254. title Issue. In the King's Bench you may apply for a rule to abide by the plea, or plead such other as defendant will abide by, either *instantly*, or on the morrow. *2 Burr.* 781. Vide my *Instr.* 5 edit. 225. If the plea be not abided by, the defendant cannot deliver any other

Abiding by the plea.

Pleas in Bar.

other than the general issue, and a set-off, 1 *Term Rep. K. B.* 693.

A motion was made for defendant to abide by plea pleaded. This court rejected, the motion saying it was unnecessary, inasmuch as by the practice of this court a defendant must abide by his plea. *Cooper v. Mansfield. T. 31 Geo. 3.*

Mutual Debts.

AT common law, if the plaintiff was more indebted to the defendant than the defendant was indebted to him, yet the defendant had no method to strike a balance: he could only go into a court of equity for doing of what is most clearly just and right to be done; and in order to prevent such expence, by *Stat. 2 Geo. 2. c. 22.* it is enacted, That where there are mutual debts between the plaintiff and defendant, and if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case requires, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue.

Mutual debts
may be set off,

Natural equity says, that cross demands should compensate each other, by deducting the less sum from the greater; and that the *difference* is the only sum which can be *justly* due. Where the nature, employment, transaction, or dealings necessarily constitute an account, consisting of receipts and payments, debts and credits, it is certain that only the balance can be the debt; and by the proper forms of proceedings in courts of law or equity, the balance can only be recovered.

8 *Geo. 2. c. 24.* enacts, That mutual debts may be set against each other, either by pleading in bar, or given in evidence on the general issue, in the manner as in the 2 *Geo. 2. c. 22.* mentioned, notwithstanding that such debts are deemed in law to

Mutual debts
may be set off by
pleading in bar,
&c.

unless on bond,
then to be plead-
ed,

be of a different nature, unless in case where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty: and in all cases, where either the debt for which the action hath been, or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shewn how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid. Made perpetual 14 Geo. 2. c. 34. 21 Geo. 2. c. 33. 24 Geo. 2. c. 28.

In an action on bond the defendant must set forth in his plea what is *really due* on the bond before he is intitled to set off any cross demand under the statute, and such averment is traversable. 3 Term Rep. K. B. 65. *Symonds v. Knox*.

Mutual debts be-
tween a bank-
rupt and any
other person,
how to be set off.

By 5 Geo. 2. c. 30. Where it shall appear to the commissioners, that there has been mutual credit given to the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, or the assignees of the bankrupt's estate, shall state the account between them, and one debt may be set against another, and what shall appear to be due on the balance, and no more, shall be claimed or paid on either side.

In case assignees
sue, defendant
may set off.

In an action brought by the assignees for money due to the bankrupt, the defendant may plead a set-off for money due from the bankrupt to him; but if some of the counts are for debts arising since the bankruptcy, he cannot plead a set-off as to those counts. *Cowp. 133. Ridout v. Brough. Vide a particular case in my Instr. 5 edit. 253.*

2 Geo. 2. c. 22.
3 Geo. 2. c. 24.

The provision of these acts does not go to goods or other specific things wrongfully detained; and therefore neither courts of law or equity can make the

the plaintiff, who sues for such goods, pay first what is due to the defendant; except so far as the goods can be construed a *pledge*; and then the right of the plaintiff is to redeem. The convenience of commerce and natural justice are on the side of liens; and therefore of late years courts lean that way: First, Where there is an *express contract*; secondly, Where it is implied from the usage of trade; or, thirdly, From the manner of dealing between the parties in the particular case; fourthly, Or where the defendant has acted as a factor. Therefore a dyer has no lien on goods delivered to him in the course of trade, *but for the price of dying*. *Green v. Farmer & al.* 4 Bur. 1221. *Lord Mansfield*.

In replevin, the avowant justified under a distress for rent, the plaintiff at *nisi prius* insisted, that there was more due to him than the rent amounted to, and *Dennison, J.* refused the evidence. Upon a motion for a new trial, the court held, that 2 Geo. 2. did not extend to the case of a distress; for that is not an action, but a remedy without suit: they likewise declared, that it did not extend to detinue, and the like actions of wrong. *Bull.* 177.

Where the debt is of an equal sum, there the action is barred; but if it be for a less sum than for what the action is brought, the defendant must pray to have it set off. *Bull.* 175.

When an executor sues in his own right, the defendant cannot set off a debt due from the testator. *Shepman v. Thomson.* *Cooke's Rep.* 151.

If the defendant's demand does not countervail the plaintiff's, he should move the court wherein the action is depending, for leave to pay so much money into court, as with his own demand will be sufficient to satisfy the plaintiff's.

The notice of set-off should contain *certainty*; for the legislature designed them to be in the nature of cross actions.

A set-off reducing the plaintiff's demand under 40s. does not affect the jurisdiction of the superior courts,

The 2 Geo. 2. does not extend to the case of a distress;

nor to detinue, or the like actions of wrong.

Where the debt is of an equal sum, the action is barred; but if less, defendant must set off.

If defendant's demand does not countervail plaintiff's, must move to pay money into court.

Notice to contain certainty.

A notice of set-off reducing plaintiff's de-

mand, does not affect the jurisdiction.

Plaintiff may have a particular of defendant's set-off.

In what actions there may be a set-off.

In what a set-off cannot be pleaded, or notice given.

A debt barred by statute of limitations cannot be set off.

courts, 3 *Wils.* 48. *Gross v. Fisher*, so that if plaintiff recover 1 s. damages, he must have his costs. *Vide Str.* 1191.

As the defendant is intitled to a particular of the plaintiff's demand, it is now the practice that the plaintiff shall have a particular of the defendant's demand in which he means to set off, and this may be done by summons from a judge; and if such particular is not delivered within the time limited by the order, the defendant is precluded from going into his set-off.

Debt upon a simple contract may be set off against a specialty debt, *Bull.* 176. A simple contract, against debt upon an annuity bond, 2 *Burr.* 820. Mutual debts between the testator and executor, without suit, *Bull.* 75. Simple contract, against debt upon a lease, for non-payment of rent, *Ibid.* 177. And actions where the demands are of the same nature may be set off, and a judgment in *K. B.* may be set off against a judgment in the *C. P.* 3 *Wils.* 396. *Barker v. Brabam*. But notice of set-off need not be given by defendant in an action for money had and received to plaintiff's use, where defendant *had paid plaintiff his whole demand* (except what he retained for his labour and service). 4 *Burr.* 2134.

But debt due to a man in right of his wife, in an action against him, on his own bond, cannot be set off. *Bull.* 175. Nor can a penalty upon articles of agreement, though forfeited. *Ibid.* Nor simple contract for cloaths to a bail-bond. *Ibid.* Nor can there be a set-off in replevin, though the distress was taken for rent. *Ibid.* 177. Nor can a bond be set off at the suit of assignees of a bankrupt, to an action by them, for goods sold and delivered. 1 *Wils.* 155. *Ryall v. Larkin*. A debt barred by statute of limitations cannot be set off; if pleaded in bar, the plaintiff may reply the statute of limitations. If it is given in evidence, on a notice of set-off, plaintiff may object to it at the trial. *Bull.* 176. *Str.* 1271. In covenant, unliquidated damages

Mutual Debts.

damages arising from the breach of other covenants, to be performed by the plaintiff, cannot be pleaded by way of set-off. *Cow.* 56.

A judgment in the *K. B.* may be set off in the *C. P.* and the balance due to plaintiff, ordered to be paid upon motion. *Barker, adm. v. Braham.* *3 Wils.* 396. Judgment in *K. B.*

This application to the court to narrow its own execution, is very reasonable, and there can be no real and solid objection to it in point of law, justice or equity. Therefore let one judgment be set against the other. *Vide 2 Black.* 826. *Thruston v. Crafter.* *Vide my Instr.* 5 edit. 254. *K. B.*

Of paying Money into Court.

For why the practice was introduced. Vide 2 Keb. 555.

THIS practice was introduced for the sake of giving a party (who had never had it in his power to make a tender, or neglected to make one) an opportunity of satisfying the debt for which the action had been commenced, and likewise to deliver him from the necessity of proving the tender, if he had made one.

When the dispute between the parties is not whether any, but what sum of money is due to the plaintiff, it is necessary that so much as is acknowledged by the defendant be brought into court; that is, paid into the hands of the proper officer for the use of the plaintiff; who may *at any time*, either before or after trial, though nonsuited, receive so much to be due.

Payment of money into court is only an acknowledgment that the plaintiff is entitled to recover the sum so paid; but it does not preclude the defendant from *taking any objection to the action beyond that sum*; though unless such sum were paid, such objection would be a bar to the plaintiff's action. 1 Term Rep. K.B. 64. *Cox v. Parry*.

In what actions money may be paid into court.

Money may be paid into court *in all actions* where the sum demanded is a sum certain, or capable of being *ascertained by mere computation*, without leaving any sort of discretion to be exercised by the jury: it is right and reasonable to admit the defendant to pay the money into court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril. 2 Burr. 1120.

In actions on the case upon *indebitatus assumpsit*, where there is a *quantum meruit*, Str. 579.; debt for rent, covenant for non-payment of rent, *Barnes* 180.

180. *Dixon v. Allen*; covenant in a sum certain, as 11 l. for not dressing corn, *Barnes* 284. *Wal-nouth v. Houghton*, for non-payment of rent, and 5 l. for advanced rent for ploughing meadow ground, 2 *Black. Rep.* 837. *Fulwell v. Hall*, but not generally. Upon a policy of insurance, *Stat. 19 Geo. 2. c. 37.* may be brought into court on the common motion of course: but in trover covenant upon a charter-party and debt for a penalty, the court must be specially moved upon an affidavit of the facts; nor will the court give the defendant liberty to bring money into court on some of the counts, and demur to the rest, *Pract. Reg. C. P.* 236. *James v. Hovey*: for the reason of making the rule for bringing money into court, is to prevent vexation, and make an end of the cause. *Vide my Instr. 5 edit. K. B.* 257.

In replevin on several avowries for rent in arrear, court allowed 9 l. mentioned therein to be brought into court, *Vernon, W. v. Wynne.* 1 *H. Black. Rep.* 24. *Salk.* 597. *Gregg's* case in point. The court of K. B. allowed the owner of a stage coach, in an action for the loss of a trunk, to pay 20 l. into court. *Hutton & ux. v. Bolton*, cited in 1 *H. Black. Rep.* 299. In an action of trespass where defendant had justified for non-payment of rent, the plaintiff was permitted to pay the rent into court. 1 *H. Black. Rep.* 24. cited in *Vernon v. Wynne.*

There are cases in which motions have been made to bring household goods into court, but the court have refused them, because they must keep a warehouse to deposit them; in this case the court have made a rule to shew cause why the plaintiff should not consent to accept the goods and his costs. *Cooke v. Holgate.* *Cooke's Rep.* 130. *Barnes* 281. *S. C.* But as these sort of rules are discretionary, and if it appears that the goods have been cut, scowered, altered, or lessened in value, the court will discharge the rule. *Royden v. Batty.* *Barnes* 284.

As to goods being ponderous.

The

Penalty of bond.

The whole penalty of a bastardy bond was permitted to be paid into court, and *De Grey, C. J.* said, The bond ascertains the damage by consent of parties. If therefore the defendant pays the plaintiff the whole, what can he desire more. *Rule absol. Branguin v. Perrott. 2 Black. Rep. 1190. Vide Lord Lonsdale and others v. Church. Term Rep. 2 V. 389.* where it is said the penalty is merely a security, and where it is not sufficient, plaintiff may recover damages as well as the penalty, and court refused the motion in *K. B.*

Note.

In trover, a note was brought into court. *Tunney v. Clarke. Cooke's Rep. 59.* A ring and goods refused. *1 Wils. 23.* So pictures. *Ibid.*

Principal and interest on bond may now be brought into court.

Formerly the defendant, in an action of debt upon bond, who had obtained the common rule, must have brought the whole penalty into court; but now this hardship is remedied by *Stat. 4 Ann. c. 16. s. 13.* whereby it is enacted, *That if pending an action, upon a bond with condition, to be void upon payment of a less sum, the defendant shall bring into court all the principal money, and interest due, and costs; the said money shall be taken to be a full satisfaction of the said bond, and shall discharge defendant.*

This act reforms, in some instances, an erroneous course of proceeding in the courts of law and equity, which ought never to have prevailed, and which the courts themselves might and ought to have remedied, but did not: therefore it should not only have the most liberal construction, but the courts ought to exercise their own authority to extend the spirit and reason of this parliamentary interposition, "*for the easier, speedier, and better advancement of justice,*" to cases not mentioned in the act. This act meant, that in cases of penalties by way of security, the clear final justice of the case should be attained in courts of law. *3 Burr. 1373.*

Money due by first instalment may be brought in, but not to

Bond given for money payable by instalments, action is brought for the penalty on non-payment of one of them, the court will give leave to pay the money

money in arrear, and costs, but the plaintiff must sign judgment with a stay of execution, until there be a failure in some future payment. stay the plaintiff from signing his judgment.

Action was brought on a bond to secure an annuity by instalments; a rule was made absolute to stay the proceedings, on payment of 3*l*. (the only instalment due and costs;) made absolute. *Barnes* 288. *Moss, adm. v. Hardy.* Annuity.

Leave was given to bring 5*l*. 5*s*. into court on a common rule, with respect to the seventh and eighth counts, there being nine in the declaration; and as to the rest, to plead the general issue, the statute of limitations and a set-off. This is similar to covenant for non-payment of rent where other breaches are also assigned. If plaintiff takes the money out, he must have costs of the whole to that time. *Hellier v. Hall.* *Barnes* 286. To pay 5*l*. 6*s*. on the 7th and 8th counts.

Money paid into court generally on two counts in debt for penalties on the game laws, being actions popular and not *qui tam*. *Stock v. Eagle.* 2 *Black. Rep.* 1052. Game laws.

Like leave was granted on the common rule, and to plead *plene administravit*, and the general issue to the whole. *Ibid.* 287. *Austin v. Ross.* Executor.

Debt on bond conditioned to pay 600*l*. and interest in three years from the date of the bond, by instalments, of 15*l*. half yearly, and 615*l*. at the end of the term, which is not yet arrived. On failure of payment of interest, obligee brought his action; and it was now moved to stay proceedings on payment of the interest due: but the court ordered judgment to be entered for the whole, with stay of execution, on payment of the interest due. *Marsen against Touchet.* 2 *Black. Rep.* 706. *q. costs.* On bond to pay interest half-yearly, and the principal in three years; leave to pay interest and costs granted.

Bond was given to pay 496*l*. by instalments; and if default made in payment of any one instalment or more, then to be in force for the whole, then remaining due and unpaid. On default, bond was put in suit; and after verdict it was moved to stay proceedings on payment of the instalments Proceedings on bond for payment of money by instalments, and on default to stand in force for the whole sum, shall not be staid

upon payment of
the instalments
in arrear.

instalments now due with costs. *Court held*, that upon this special condition, the defendant is not intitled to this indulgence under either of the acts of 4 & 5 Ann. or 8 & 9 W. 3. c. 11. This is not to relieve against a forfeiture; for the plaintiff, at his peril, must enter up his judgment for no more than the residue of the principal and interest *bona fide* due and unpaid. The plaintiff had agreed to give time to the defendant, and to forbear prosecuting his just demand, provided the defendant would punctually discharge it by instalments. By neglecting so to do, he has lost the benefit of this condition, and remains in the case of other debtors upon bond. Discharge the rule. *Ibid.* 958. *Gowlett, ex. v. Hanforth.*

Withdrawing of
plea.

After plea of general issue, leave was given to withdraw it, and bring into court 2*l.* 2*s.* and plead same again on terms. *Barnes* 269. *Phillips v. Barker.*

Bankruptcy and
general issue.

Leave to plead bankruptcy to the first count, and to bring money into court on the common rule, and plead the general issue to the other counts, was given. *Barnes* 350. *Hall v. Lane.*

Judgment by
defendant.

If one defendant suffers judgment to go by default, and the second is outlawed, the third shall not bring money into court. 2 *Black. Rep.* 1029. *Kay v. Panchiman.*

Upon arrest of
judgment, plain-
tiff ordered to
take the money
out of court.

Judgment was arrested, and consequently no costs on either side; but the court ordered the money brought in to be paid to the plaintiff. *Barnes* 284. *Fisher v. Kitchingman.*

In what actions
money cannot be
paid into court.

Actions on the case for immoderately driving a hired chaise, and for consequential damages, Str. 87.; *trespass for the mesne profits in ejectment, 2 Wils.* 115.; *for dilapidations, Str.* 906. *debt upon a bond to a sheriff conditioned for the good behaviour of his bailiff. Barnes* 285. *Atkins v. Taylor, and inter alia, for paying money collected for the sheriff's use; upon a bond for the performance of a collateral agreement; upon a counter bond; money cannot be brought into court.*

Defendant had brought money into court; plaintiff would not accept same, but proceeded to trial, and was nonsuited; upon which defendant moved in the treasury, that in regard as the plaintiff was out of court he might have the money back; but denied. Afterwards plaintiff brought a new action, and the court made a rule, *That the plaintiff might have the money brought in if he thought fit; but if not, that the money brought in should remain for the new action.* Pract. Reg. 250. *Lane v. Wilkinson.*

Money brought into court, plaintiff would not accept, and was nonsuited, defendant could not have it returned.

But on a new action being brought, the court made a rule that he might have that money, if not, that it should remain to the new action.

The like resolution in a similar case as above, and gave leave for the defendant to bring money in to the new action. Pract. Reg. 252. *Dickins v. Tallowin.*

The plaintiff having been sued by the now defendant, and obtained judgment of nonpross, brought debt for the costs, and signed judgment. On that judgment, he brought a second action of debt, on the 6th of February last; filed a declaration on the 7th of May; and on the 15th, two days after Easter term, signed judgment. Motion that on bringing into court the debt and costs recovered by the second judgment, proceedings on a third between the same parties, might be set aside with costs. The cause shewn was, that this was the last of four nonprosses in actions brought by the defendant for the same cause. The court thought the plaintiff had given the first provocation, and had also been guilty of laches in not sooner applying to the court, and paying what was really due; and therefore discharged the rule for setting aside the judgment, but without costs; — and directed execution to stay; as the money due on the former judgment was paid into court, in order to discountenance such oppressive actions. *Simpson v. Stone.* 2 Black. Rep. 785. Trin. 11 Geo. 3.

In action on a judgment obtained in an action on a former judgment: execution stayed after the third judgment on payment into court the debt and costs recovered on the second.

The plaintiff in replevin may pay the rent into court for which the defendant avows. *Vernon, W. v. Wynne,* Bart. 1 H. Black. Rep. 24.

Replevin.

Money

Money paid into court, plaintiff recovered a less sum, defendant moved to have the money out of court towards his costs.

After payment of money into court, plaintiff recovered more, and became bankrupt; the assignees moved to have the money paid them.

If plaintiff delivers the issue, he may still have the money, but if he proceeds no further, he is to pay costs of the issue.

If plaintiff dies.

If defendant dies.

Money was paid into court, plaintiff proceeded and recovered a less sum, whereupon defendant moved in the treasury, that he might have the money out of court towards his costs, and granted. *Barnes* 280. *Anon.*

Thirty-seven pounds was paid into court, plaintiff recovered a greater sum, and after became a bankrupt; the assignees moved to have the 37*l.* paid to them; but the plaintiff's attorney insisting, that as he had been the means of obtaining the verdict, he ought first to be paid his bill. Whereupon the court ordered his bill to be taxed, Ward to be allowed 7*l.* 4*s.* received by him of plaintiff in part, and then to be paid out of the money in court, and the residue to be paid to the assignees. *Owston v. Obryan.* *Barnes* 145.

Defendant moved to pay money into court, which plaintiff refused to accept, and delivered an issue with notice of trial. Plaintiff afterwards declined proceeding, and moved that he might have the money with costs to the time of the rule for payment into court, consenting to allow defendant subsequent costs and a rule to shew cause, which was made absolute. *Davies v. Mansell.* *Barnes* 282. *Savage v. Francklyn, the like* *ibid.* 280. I think a summons now will do.

The same mode is now adopted in *K. B. Term Rep.* 1 *V.* 629. But if plaintiff proceeds to trial and a juror is withdrawn, the plaintiff is not entitled to costs up to the time of payment of money into court. 3 *Term Rep. K. B.* 657. Nor after verdict for defendant. 4 *Term Rep.* 10.

If after money is paid into court, plaintiff dies, court will refuse to let defendant have the money out. *Crockay v. Martin.* *Barnes* 181.

If defendant dies, court will not let defendant's executor have it. *Knaxton v. Drew.* *Barnes* 279.

Money may be paid into court upon the common rule after rule to plead is out, and at any time before plea pleaded. *Barnes* 279. *Anon.*

How

How to pay money into court. In actions where there can be no doubt but that you may pay money into court, viz. (such as have been stated) if the sum paid in, does not amount to more than 5*l.* then apply to the secondary for a treasury rule for that purpose, pay him 6*s.*; take the rule to the prothonotaries office, and the clerk will receive the money, and put a receipt in the margin, pay him 1*d.* in the pound, 1*s.* 4*d.* for receipt, and for entering plea 2*s.* more; serve copy of the rule on plaintiff's attorney. In K. B. by motion in all cases in court.

If the sum does not amount to more than 5*l.*

If it is more than 5*l.* then a serjeant's hand to a brief is requisite, and (if you plead the general issue) he signs it of course; take it to the secondaries as before, draw up rule, pay 6*s.* pay the money to the prothonotaries clerk, and for every pound 1*d.* and 1*s.* 4*d.* for receipt; entering plea 2*s.*; serve copy of rule on plaintiff's attorney.

If more, then how to proceed.

If the plaintiff accepts the money out of court, and is content, he may then apply to the secondary, and take an office copy of the rule; pay 2*s.* 6*d.* and get an appointment from one of the prothonotaries to tax the costs; serve copy of rule and appointment on defendant's attorney, when the costs are taxed; if the same are not paid on demand, you may move for an attachment against the defendant in this court. But in the K. B. you cannot, but must go on to trial there, be the debt what it may, which is frequently the ruin of both parties, especially when the debt is small.

If the money is accepted out of court, then how to proceed for the costs.

If the plaintiff be not satisfied with the sum paid into court, he may apply to the prothonotaries, and on producing an office copy of the rule, they will pay the money, on deducting the poundage and receipt, and then he may deliver the issue, with notice of trial: [but if, on the trial, he does not recover a greater sum of money than what was paid into court, he will be nonsuited, and must pay costs to the defendant.]

Plaintiff's attorney, though not satisfied with the sum brought in, may take it out, and proceed on.

Y

If

How

If defendant pleads any other plea besides the general issue, and pays money into court, he must move.

If the defendant means to plead more pleas than the general issue, and also pay money into court, he must then give brief to a serjeant, to move to plead double as before, fee 10s. 6d. draw up the rule with the secondary and serve same, make it absolute. In this case the secondary always draws up the usual rule to pay money into court, as also the absolute rule; pay into court the money, and serve copies of the rules on plaintiff's attorney; and deliver plea at same time, or file it.

In the Common Pleas.

Hilary Term, in the 33d Year of King George the Third.

Rule to pay money into court.

Alexander Denn against *Richard Fenn*, Monday the 25th of *January*. It is ordered, That the defendant shall pay to the plaintiff, or to his attorney, 10*l.* together with his costs to be taxed by one of the prothonotaries of this court, if the plaintiff will accept thereof, in full discharge of this suit; and that thereupon all proceedings in this action shall be staid: but if the plaintiff will not accept thereof in full discharge of this suit, that then the defendant shall immediately bring the said 10*l.* into this court; and the said 10*l.* shall be considered as struck out of the declaration, and be paid out of court to the plaintiff or his attorney; and upon the trial of the issue, the plaintiff shall be permitted to take a verdict for so much only as he shall prove beyond the said 10*l.*

This rule is conditional, therefore it behoves defendant to proceed on it, by getting the costs taxed.

On the motion of Ser-
jeant Lawrence, for the } By the Court.
defendant.

Entered.

Fothergill.

N. B. The defendant must take care to produce this rule at the trial.

King's Bench.

By a new notice in the King's Bench the plaintiff shall procure the appointment to tax the costs, and serve same on defendant's attorney; and in default,
he

he shall be considered that he intends to proceed to recover a larger sum. 4 Term Rep. 11. Vide my Instr. 5 edit. 260.

The payment of money into court is an acknowledgment of being liable to the action. 4 Burr. 2640. Payment of money into court is an acknowledgment of the action.

If the money be paid into court a week after the end of the term, there must be a judge's order obtained to authorize the rule to be drawn up.

Tender.

Tender.

TENDER comes from the French *tendre*, in Latin *offerre*, and in a legal sense denotes as much as carefully to offer, or circumspectly to endeavour the performance of any thing belonging to us; as to tender rent is to offer it at the time and place where and when it ought to be paid; and it is an act done to save the penalty of a bond, and of money for rent, or contract, before distress or action brought.

It may be made in purses, or bags, without shewing, or telling the same, for it is the receiver's business to put it out, and tell it, *Co. Lit.* 208. a.; and it must be by offering the bags to the plaintiff, and not holding them under his arm. *Noy* 74. And every tender at the common law, or which is given by statute, *must be made before the writ sued out*, or it is bad. *Brown's Tend.* 9. See 21 *Jac.* 1. c. 16. s. 5.

In pleading a tender in debt, defendant prays judgment de damnis, in case de ulterioribus damnis.

There is a difference in pleading a tender in an action of debt, and in an action on the case; in debt, the damages are but accessory, so that in pleading a tender to such action, "*the defendant must pray judgment of the damages;*" but in *assumpsit*, the damages are principal, and he is to plead, "*always ready,*" with a *profert hic in curia*, and "*pray judgment de ulterioribus damnis.*" *Salk.* 622. 3 *Salk.* 344.

Tender of goods how to be pleaded.

If a tender at the day, of corn, or of any other goods of a perishable kind, be pleaded, with a refusal, there is no need to plead *uncore prist*, *still is ready.* 9 *Rep.* 70. 1 *Inst.* 207.

When to say *touts tems prist* in the plea.

Wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, it is not enough for the party who pleads the tender, to plead a tender and refusal, and *uncore prist*; but he must also plead "*touts tems prist,*" "that

"that he has always been ready." *Salk.* 622. 12
Mod. 152. *Carth.* 413.

Every requisite which is in a particular case necessary to the validity of a tender, must, in pleading such tender, be shewn to have been complied with, else the plea is not good. *Salk.* 624.

All must be shewn to have been complied with, else the plea is bad.

Tender of stock must be at the last part of the day it can be accepted. *Str.* 777.: and the usual hours must be set forth. *Ibid.* 832.

Tender of stock.

Formerly the plea of tender could not be pleaded after the four days, nor after imparlance without leave of the court, *Barnes* 343. 354. because strictly pleading a plea of tender was in the nature of a plea in abatement, and not an issuable plea. *Noble v. Hervey.* *E.* 27 *Geo.* 3. But Lord Loughborough declared, that as the practice of the King's Bench differed from the practice of this court, and as a plea of tender was a fair and just plea, it would be right to alter the practice of this court in conformity to that of the King's Bench, and to permit the defendant to plead a tender after a judge's order for time to plead. *Noone v. Smith.* 1 *H. Black. Rep.* 369. So in *Barnes* 362. *Vide* 3 *Burr.* 59. my *Instr.* 5 edit. 265.

May now be pleaded after a judge's order for time.

If pleaded after imparlance, must be pleaded as of the preceding term, and a treasury rule should be obtained for this purpose. *Non assumpsit* as to part, tender as to the residue, and a set off allowed. *Noon v. Smith.* 1 *H. Black. Rep.* 369. But the King's Bench have refused *non assumpsit* to the whole, and a tender as to part. 4 *Term Rep.* 194. *Vide* my *Instr.* 5 edit. 265. So *non est factum*, and a tender. 5 *Term. Rep.* 97.

If pleaded after imparlance.

The court will not give leave to plead *non assumpsit* and a tender, because it only serves to lengthen the record; for the plea of tender always concludes with a *non assumpsit*, as to the residue of the demand. *Dowgal v. Bowman.* 2 *Black. Rep.* 723. 3 *Wils.* 145. *S. C.*

Non assump. and tender not to be pleaded.

Not guilty and tender of amends in trespass is allowed. 2 *Black. Rep.* 1089. *Martin v. Kesterton.*

Not guilty and tender.

After demurrer and amendment made of the declaration, may plead a tender.

After demurrer to a declaration, and amendment made, the court gave leave to defendant to plead a tender, as of last term, or that plaintiff might make his declaration of this term. *Roberts v. Hughes. Barnes 359.*

Will not permit the plea to be withdrawn, and plead non assumpsit.

After plea of tender, and money brought into court, the court will not admit defendant to withdraw his plea, and plead the general issue. *Barnes 330. Reeves v. Probart.*

Money tendered must be paid into court; and how done before plea.

The defendant's attorney must pay the money tendered into the hands of the prothonotaries, at the time the plea is pleaded. *Bray v. Booth. Barnes 252.* who will give a receipt for the same in the margin of the draft of plea; pay him 8*d.* per sheet, 1*d.* in the pound, and for receipt 1*s.* 4*d.* and no rule is drawn up to pay the money into court, file plea.

Fresh demand and refusal.

A right to damages, on account of non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refusal, be revived again by a demand, subsequent to the tender and refusal; a new cause of action arises from the non-payment or the non-performance thereof, upon such demand, 5 *Bac. Abr. 12. Brownlow 71.*; and therefore the plaintiff may reply such subsequent demand and refusal by the defendant, which, if proved, plaintiff must have a verdict.

If plaintiff take issue on the tender, he must not take money out of court; but he may proceed on general issue for further damages.

If the plaintiff take issue on the tender only, he must not take the money out of court, for by taking it he admits the same to be right; and judgment is given for the defendant to go quit *as to that plea*; but if he take the money out, and means to proceed for further damages, he may enter an *acquittal as to the tender*, and proceed on the general issue for the residue.

Tender by justices.

Tender of amends may be made by justices of the peace within a month after notice given of an action intended to be brought against them for any thing done by them in the execution of their office, and they may plead the same with *Not Guilty*, and any other plea, with leave of the court; and in

case they shall neglect to make such tender, they may, before issue joined, pay money into court. 24 Geo. 2. c. 44. s. 24. Before a justice is allowed to pay money into court, on an action for false imprisonment, it must appear *that he is sued as a justice, for some misbehaviour in his office.* 2 Black. Rep. 859. *Gosbourn v. Ball.*

The defendant may, to a trespass *quare clausum fregit*, plead a disclaimer, and that the trespass was by negligence, or involuntary, and tender of sufficient amends before action brought; whereupon, or on some of them, the plaintiff shall be enforced to join issue. Stat. 21 Jac. 1. c. 16.

Tender may be made before action, for any unlawful act done by a person who has distrained for rent justly due, 11 Geo. 2. c. 19. s. 20.; likewise in distraining for money justly due for the relief of the poor. 17 Geo. 2. c. 38. s. 10.

A tender in any money coined at the Mint upon which there is the king's stamp, is good; for all such money is good in proportion to its value, without a proclamation. Salk. 446. Comb. 387.

To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding; for it is not within the statute of Jac. 1. which goes only to trespass, where tender of amends may be pleaded to have been made at any time before action brought. Lutw. 1596.

To an avowry for rent, the plaintiff may plead a tender and refusal, without bringing the money into court, because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. Buller's Nisi pri. 60. Salk. 584.

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs, in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises: and then such plea is given by 11 Geo. 2. c. 19. s. 9.

* Y 4

A tender

Trespass,

Under distress
for rent.

Any money
coined at the
mint, good.

To an avowry
for damage fea-
sant when tender
to be made.

In a plea in bar
of tender of rent
in replevin, the
money ought not
to be brought
into court.

Bank note no
good tender,
unless, &c.

Bank notes.

A tender of a bank note as money, is not, strictly speaking, a good tender; but if the tenderer offer to get money for the note, this makes it a good tender. *Eq. Caf. Ab.* 319. Same doctrine by Lord Mansfield at Guildhall. *Hil.* 16 *Geo.* 3.

This court has never yet determined that a tender of bank notes is at all events a good tender; but if they have been offered, and no objection has been made on that account, the K. B. have considered it as a good tender. 3 *Term Rep.* 554. per Buller, J. *Vide* 1 *Burr.* 459. my *Instr.* 5 edit. 268.

If the money be
not paid into
court.

Tender as to
part non ass. as
to residue, ten-
der found for def.
and bal. proved
under 40s.
defendant shall
have no costs,
if the whole of
plaintiff's de-
mand exceed
40s.

On a plea of tender, if the money be not paid into court, the plaintiff may sign judgment.

If there is a plea of tender as to part of 2l. 18s. and *non assumpsit* as to the residue, and the plea of tender being found for the defendant, the balance proved on the *non assumpsit* is under 40s. viz. 7s. 6d. yet, if that added to the sum tendered exceed 40s., the defendant, though subject to the court of conscience in *Middlesex*, is not intitled to double costs, under 23 *Geo.* 2. c. 33. s. 19. *Heaward v. Hopkins.* *Dougl.* 448. 1 *Wils.* 525. If demand exceed 40s. the inferior court has no jurisdiction.

Pleas in Abatement.

AND the said *Mary* in her own proper person comes and says, that she now is, and before the issuing forth of the said original writ of the said *John*, was, and ever since hath been, covert and married to one *William Morris*, then and still her husband, and living, to wit, at *London* aforesaid, in the parish and ward aforesaid, and this the said *Mary* is ready to verify; wherefore because the said *William Morris* is not named in the said writ, the said *Mary* prays judgment thereof, and that the same may be quashed, &c. Coverture pleaded in abatement.

G. B.

For other pleas, *vide my Instr. 5 edit. 269.*

The defendant is to deliver his plea in writing on paper (stamped with a treble penny stamp) to the plaintiff's attorney, *R. Mich. 1654.*; and formerly if there was no such attorney to be found, or being found refuseth to accept it, then the plea might be filed in the office. *Ibid. N. B.* But now the practice is either way.

Pleas in abatement are to be signed by a serjeant; fee 10 s. 6 d.

In the Common Pleas, { *John Lee*, Plaintiff,
and
Mary Nix, Defendant.

Mary Nix, of, &c. the defendant in this cause, Affidavit.
maketh oath and faith, That the plea hereto annexed is true in substance, and matter of fact.

Sworn, &c.

Mary Nix.

To be sworn before a judge, and ingrossed on a treble six-penny stamped paper, and annexed to the plea.

An affidavit made by the attorney was held sufficient, the statute requiring only probable cause to be shewn. *Barn. 344. Pract. Reg. 6.*

How

Cassetur breve.

How to enter a *cassetur breve* in case the plea filed be true.—Get a roll from the prothonotaries of the term declaration is of, and enter the whole declaration and plea thereon, and at the foot of the plea enter the *cassetur breve* thus:

Entry of *cassetur breve*.

And thereupon the said *T. W.* says, That he cannot deny the said exceptions of the said *J. R.* above by his plea taken to his said writ, but admits the same to be true; therefore it is considered by the court here, that the said writ of the said *T. W.* be quashed, &c.

There are no costs on either side.

Take the same to the prothonotaries office and docket it, pay for the entries 8*d.* per sheet, then sue out a new writ.

This need not now be done; the declaration may be amended on payment of costs, and defendant to plead *de novo*; in case the defendant be sued by a wrong name, by a judge's order.

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General Issues.

THE general issue, or general plea, is, what General issues.
traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it ; as in trespass either *vi et armis*, or on the case *non culpabilis*, not guilty ; in debt upon contract, *nil debet*, he owes nothing ; in debt on bond, *non est factum*, it is not his deed, or on an assumpsit, *non assumpsit*, he made no such promise. Or in a real action, *nul tort*, no wrong done ; *nul disseisin*, no disseisin ; and in a writ of right the mise or issue is, that the tenant has more right to hold, than the demandant has to demand. These pleas are called the general issue, because by importing an absolute and general denial of what is alledged in the declaration, they amount at once to an issue, by which is meant a fact affirmed on the one side, and denied on the other.

No general issue need be signed by a serjeant, but it is to be ingrossed and *delivered* to the attorney for the plaintiff on a treble penny stamped paper, or it may be *filed* with the prothonotaries, pay 2 s.

And the said *John*, by *R. C.* his attorney, comes Non assumpsit.
and defends the wrong and injury, when, &c. and says, that he did not undertake and promise, in manner and form as the said *A. B.* hath above thereof complained against him, and of this he puts himself upon the country, &c.

And the said *John*, by *R. C.* his attorney, comes Non est factum.
and defends the wrong and injury, when, &c. and says, that the said writing obligatory (or indenture) is not his deed ; and of this he puts himself upon the country, &c.

And says, that he does not owe to the said plaintiff the said 100*l.* or any part thereof, in manner and form as the said *Richard* hath above thereof complained Nil debet.

*Nil debet to a
qui tam action.*

complained against him; and of this he puts himself upon the country, &c.

That he doth not owe to our said lord the king, and to the said *Richard*, who sues as aforesaid, the said 100*l.* or any part thereof, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

*Non assumpsit
testatoris.*

That the said *A. B.* in his life-time did not undertake or promise, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

Non detinet.

That he doth not detain from the said *Richard* the said indenture of lease, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

*Not guilty in
trespass.*

That he is not guilty of the supposed trespass aforesaid above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

*Not guilty in
trespass and
assault.*

That he is not guilty of the supposed trespass and assault, above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

*Not guilty in
case.*

That he is not guilty of the premises above laid to his charge, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c.

*Non assumpsit
and notice of
set-off.*

And the said *John*, by *J. S.* his attorney, comes and defends the wrong and injury, when, &c. and says, that he did not promise and undertake, in manner and form as the said *Benjamin* hath above thereof complained against him; and of this he puts himself upon the country, &c.

In the Common Pleas.

Benjamin Philpot, Plaintiff,
Between and
John Shears, Defendant.

Take notice, that the above defendant will at the trial of this cause give in evidence, and insist, that the plaintiff before, *and at the time of the commencement* of this suit, was, and still is indebted unto the said defendant in the sum of 200*l.* for the use and hire of divers horses, mares, and geldings, by him the said defendant let to hire to the said plaintiff, and at his request, and for the carriage of divers goods, wares, and merchandizes of the said plaintiff, at his like request, in divers waggons, carts, and other carriages of the said defendant, and at his like request; and for the work and labour of the said defendant by him and his servants, with his horses, carts, waggons, and other carriages done and performed for the said plaintiff, and at his like request; and also for the work and labour, care and diligence of the said defendant, by him before then done and performed for the said plaintiff, and at his like request; and also for money paid, laid out, and expended by the defendant for the said plaintiff, and at his like request; and for money by the said defendant before then lent and advanced to the said plaintiff, and at his like request; and for money by the said plaintiff had and received to and for the use of the said defendant, and for divers goods, wares, and merchandizes by the said defendant before that time sold and delivered to the said plaintiff, and at his request; and for money due and owing from the said plaintiff to the said defendant upon an account stated between them; which said sum of 200*l.* is still due and owing from the said plaintiff to the said defendant; and out of which sum of money he the said defendant will at the trial of this cause, set off and allow to the said plaintiff so much against any demand of the said plaintiff, to be proved at the said trial,

Notice of set-off
for work and
labour, with
horses, &c.

General Issues.

as will be sufficient to satisfy and discharge such demand, pursuant to the statute in such case made and provided. Dated the 11th day of November 1793.

Yours, &c.

To Mr. A. B. Plaintiff's Attorney.

J. S. Defendant's Attorney.

A plea of set-off that plaintiff was indebted to the defendant at the time of the *plea pleaded*, is bad; it should state that he was indebted at the time of the commencement of the action. Per Buller, J.

For a set-off for money due on a judgment in the King Bench, *vide my Instr. 5 edit. 274.*

Special Pleas.

AND the said *John*, by *J. B.* his attorney, comes and defends the wrong and injury, when, &c. and says, That he did not undertake and promise, in manner and form as the said *Richard* hath above thereof complained against him; and of this he puts himself upon the country, &c. And for further plea in his behalf, the said *John*, by leave of the court here, for this purpose first had and obtained according to the form of the statute in such case made and provided, says, that the said *Richard* ought not to have or maintain his aforesaid action thereof against him the said *John*, because he says, that he did not undertake or promise at any time within six years next before the day of suing out of the original writ of the said *Richard*, in manner and form as the said *Richard* hath above thereof complained against him; and this the said *John* is ready to verify; wherefore he prays judgment, if the said *Richard* ought to have or maintain his aforesaid action thereof against him, &c.

Non assumpsit,
and the statute
of limitations.

To be signed by
a serjeant.

G. B.

And the said *Richard* as to the said plea of the said *John* by him first above pleaded in bar, and whereof the said *John* hath put himself on the country, he the said *Richard* doth the like, &c. And the said *Richard*, as to the said plea of the said *John*, by him secondly above pleaded in bar, says, that he ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says, that the said *John* did, within six years next before the day of suing forth the said original writ of him the said *Richard*, to wit, on the _____ day of _____ in the year of our Lord 1793, at *Westminster* aforesaid, undertake and promise in manner and form as the said *Richard* hath above thereof complained against him; and this

Replication:

To be signed by
a serjeant,

Plea of set-off
for money lent,
paid, laid out,
and had and re-
ceived.

To be signed.

this he prays may be inquired of by the country. And the said *John* doth the like, &c. Therefore as well to try this issue, as the said other issue above joined, the Sheriff is commanded, that he cause to come here, in eight days of the purification, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. C. R.

And the said *John*, by *R. P.* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said *Richard* ought not to have his aforesaid action thereof maintained against him, because he says, that the said *Richard*, before and at the time of the suing forth of the original writ of the said *Richard* against the said *John*, that is to say, on the first day of *June*, in the year of our Lord 1793, at *Westminster* aforesaid, in the county of *Middlesex*, was and still is indebted to the said *John* in a large sum of money, (that is to say,) in the sum of 100*l.* of lawful money of *Great Britain*, for so much money by the said *John* to the said *Richard*, before then lent and advanced to the said *Richard*, and at his special instance and request; and in the further sum of 100*l.* of like lawful money, for so much money before that time, paid, laid out and expended by the said *John*, for the said *Richard*, and at his special instance and request; and in the further sum of 100*l.* of like lawful money, for money by the said *Richard* before that time had and received, to and for the use of the said *John*. And the said *John* further says, that the said several sums of money so due and owing from the said *Richard* to the said *John*, as aforesaid, exceed the damages sustained by the said *Richard* by reason of the not performing the said several promises and undertakings of the said *John* in the said declaration mentioned; and that out of the said several sums of money, he the said *John* is willing, and hereby offers to set-off and allow to the said *Richard* the full amount of the said damages according to the form of the statute, &c. and this the said *John* is ready to verify. Wherefore

fore he prays judgment, if the said *Richard* ought to have his aforesaid action therefore maintained against him, &c.

G. B.

And the said *Richard* says, That he, by reason of any thing by the said *John* above in pleading alledged, ought not to be barred from having and maintaining his aforesaid action thereof against the said *John*, because he says, that he the said *Richard* was nor, nor is indebted to the said *John* in manner and form as the said *John* hath in his aforesaid plea above alledged; and this he the said *Richard* prays may be inquired of by the country; and the said *John* doth the like, &c. Therefore the sheriff is commanded, that he cause to come here, in in eight days of the purification, twelve, &c. by whom, &c. and who neither, &c. because as well, &c.

Replication;

Plea of satisfaction is in my *Instr. Cler. K. B.* 277. 5 edit. As also the replication which must be signed by a serjeant.

And the said *T.* by *A. B.* his attorney, comes and defends the wrong and injury, when, &c.; and as to the said several promises and undertakings in the said declaration mentioned, except as to 4*l.* and 4*s.* parcel of the said several sums of money in the said declaration mentioned, says, That he did not undertake and promise, in manner and form as the said *J.* hath above thereof complained against him; and of this he puts himself upon the country: And as to the said 4*l.* and 4*s.* parcel of the said several sums of money in the said declaration mentioned, the said *T.* says, That the said *J.* ought not to have or maintain his aforesaid action in this behalf against him the said *T.* to recover any further damages than the said 4*l.* and 4*s.* in this behalf, because he says, That he the said *T.* always, from the time of making the said several promises and undertakings in the said declaration mentioned, as to the said 4*l.* and 4*s.* always hitherto was, and still is, ready to pay to the said *J.* the said sum of 4*l.* and 4*s.*; and that he the said *T.* before the suing

Plea of tender to the whole of the counts, except 4*l.* 4*s.* in the declaration.

N. B. This is now the general plea in both courts.

Z

forth

The day may be stated under a scilicet.

To be signed by a serjeant.

Replication issue on the non-assumpsit, and denying the tender.

To be signed,

If the plaintiff accepts the money, and goes for further damages, then he must reply thus.

N. B. No serjeant's hand necessary.

forth of the original writ of the said *J.* to wit, on the 22d day of *April*, in the said year of our Lord 1793, at, &c. in the said county, tendered and offered to pay to the said *J.* the said 4*l.* and 4*s.*; which said 4*l.* and 4*s.* the said *J.* then and there wholly refused to receive from the said *T.*; and the said *T.* now brings the said 4*l.* and 4*s.* here into court, ready to be paid to the said *J.* if he the said *J.* will accept the same; and this he is ready to verify; wherefore he prays judgment, if the said *J.* ought to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said 4*l.* and 4*s.* in this behalf, &c.

G. B.

And the said *J.* as to the said plea of the said *T.* and whereof he hath put himself upon the country, he the said *J.* doth the like, &c. And the said *J.* as to the said plea of the said *T.* by him above pleaded, as to the said 4*l.* and 4*s.* parcel of the said several sums of money in the said declaration mentioned, says, That he, by reason of any thing in that plea above alledged, ought not to be barred from having and maintaining his aforesaid action thereof against him to recover his full damages in this behalf; because he says, that the said *T.* did not tender or offer to pay to the said *J.* the said 4*l.* and 4*s.* in manner and form as the said *T.* hath above in pleading alledged; and this he prays may be inquired of by the country; and the said *T.* doth the like, &c. Therefore, &c.

And the said *J.* as to the said plea of the said *T.* and whereof he hath put himself upon the country, he the said *J.* doth the like, &c. And as to the said 4*l.* and 4*s.* so tendered and paid into court as aforesaid, he the said *J.* freely takes and accepts out of court here; therefore, as to the said 4*l.* and 4*s.* the said *J.* is satisfied: and as to the trial of the issue above joined between the parties aforesaid, the Sheriff is commanded, that he cause to come here on, &c. twelve, &c. by whom, &c. and who neither, &c. because as well, &c.

And

And the said *Roger* by *J. S.* his attorney, comes and defends the wrong and injury when, &c. and says, that the said *Charles* ought not to have or maintain his aforesaid action thereof against him, because he says, that heretofore, to wit, in *Trinity* term, in the 33d year of his present majesty's reign, the said *Charles* impleaded the said *Roger* in the court of our lord the king, before the king himself, in a certain plea of trespass on the case on promises, to the damage of the said *Charles* of 60*l.* on occasion of the not performing the very same identical promises and undertakings in the said declaration mentioned, and such proceedings were thereupon had, in the said court of our said lord the king, before the king himself, at *Westminster*: that afterwards, to wit, in that very same *Trinity* term, in the 33d year aforesaid, the said *Charles*, by the consideration and judgment of the said court, recovered against the said *Roger* in that plea, 60*l.* for his damages which he had sustained, on occasion of the not performing the said promises and undertakings in the said declaration mentioned, and whereof the said *Roger* was convicted, as by the record and proceedings remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears; which said judgment still remains in full force, strength, and effect, not in the least vacated, set aside, paid off, annulled, satisfied, or discharged, and this he is ready to verify by the said record; wherefore he prays judgment, if the said *Charles* ought to have his aforesaid action thereof maintained against him, &c.

Plea of a judgment recovered in K. B. in cases

To be signed.

And the said *Charles*, as to the said plea of the said *Roger*, by him above pleaded, says, That he, by any thing in the above plea alledged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said *Roger*, because he says, that there is not any such record of the said recovery against the said *Roger* at the suit of him the said *Charles*, remaining in the said court

Replication

N. B. This is a complete issue without a rejoinder, and may be made up of

course, and need
not be signed.
2 Black. Rep.
316.

of our said lord the king, before the king himself, at *Westminster* aforesaid, as he the said *Roger* hath above in pleading alledged; and this he the said *Charles* is ready to verify; wherefore he prays judgment, and his damages, by occasion of the premises aforesaid, to be adjudged to him, &c.; and hereupon the said *Roger* is commanded, by the said court here, that he have the said record here in eight days of *St. Martin* at his peril; the same day is given to the said *Charles* here, &c.

Plea of bank-
ruptcy in defend-
ant.

To be signed.

And the said *C.* by *S. U.* his attorney comes and defends the wrong and injury when, &c. and says, That the said *W.* ought not to have or maintain his aforesaid action thereof against him, because he says that he the said *C.* after the making of the said several promises and undertakings in the said declaration mentioned, and before the suing forth of the original writ of the said *W.* to wit, on the first day of *August*, in the year of our Lord 1793, to wit, at *London* aforesaid, in, &c. became a bankrupt, within the intent and meaning of the several statutes made concerning bankrupts; and that the several causes of action aforesaid, in the said declaration mentioned, accrued, and each and every of them did accrue, before such time as he the said *C.* became a bankrupt, to wit, at *London* aforesaid, in, &c. and of this he puts himself upon the country, &c.

By *Stat. 5 Geo. 2. c. 30. f. 7.* The bankrupt may plead this plea generally: and it must conclude to the country. 1 *Peere Will.* 249. 10 *Mod.* 160.

Plea nul tiel re-
cord to an action
on the judgment.

And the said *James*, by *Thomas Medley*, his attorney, comes and defends the wrong and injury, when, &c. and says, That the said *Joel* ought not to have or maintain his aforesaid action thereof against him, because he says that there is not any such record of the recovery against him the said *James*, at the suit of the said *Joel*, remaining in the said court of the bench aforesaid, at *Westminster* aforesaid, in manner and form as the said *Joel* hath above

Need not have
serjeant's hand.
2 Black. Rep.
316.

above in that behalf alledged against him the said *James*; and this he is ready to verify; wherefore he prays judgment, if the said *Joel* ought to have or maintain his aforesaid action thereof against him, &c.

And the said *Joel* says, That he, by reason of Replication.
any thing by the said *James* in his said plea above alledged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said *James*, because he says, that there is such a record of recovery against him the said *James* at the suit of the said *Joel*, remaining in the said court of the bench aforesaid, as the said *Joel* hath above in that behalf alledged; and this he the said *Joel* is ready to verify by the said record, and prays that the same may be inspected, &c.; and because the said *Joel* hath not here ready the said record to be produced, day is given to the said *Joel* here until on the morrow of *St. Martin*, to have the same ready to be produced; the same day is given to the said *James* here, &c.

If a rejoinder merely concludes to the country, as a *similiter*, no occasion for a serjeant's hand.

Issue of Nul tiel Record.

Proceedings on an Issue of Nul tiel Record, on a Plea of a Judgment recovered in another Court.

When the issue on nul tiel record is final, how the rule is,

WHERE the judgment upon an issue of nul tiel record is final, the rule should be, “*unless cause within four days,*” that the defendant may have that time to move in arrest of judgment; but where the judgment is interlocutory that reason fails, and a rule *peremptory* is given by the secondary, because the defendant may move in arrest of judgment after the inquiry executed. Where the proceeding is by original, and a general return day is given to bring in the record, the defendant ought to be called to bring in the record at the rising of the court *on that day*; and if he fail, the rule for judgment should be, “*unless cause on the appearance day of that general return,*” and the record may be brought in on that or any intervening day. *Hopkins v. Knapp. Barnes 264.* But where the proceeding is by bill against an attorney, and the day given to bring in the record is a day certain, the record cannot be brought in after that day; but on that day, at the rising of the court, defendant ought to be called to bring in the record; and if he fail, the court will appoint the day to be inserted in the rule for judgment, *nisi causa. Ibid.* Plaintiff delivered the book, and gave himself a day to bring in the record, *viz. tres Trin. July 8th*, but did not bring in the record on that day. *July 9th*, plaintiff offered the record, and moved it might be read, which was refused by the court. *Calverag v. Pinhero. Barnes 343.*

Of giving the day in the replication.

You may give the day in a replication if action be by original on a *general return day* yourself, so as you make it *four days after the delivery of the issue*; and so if the action be by bill,

Upon

Upon delivery of the issue of *multiel record*, which is ingrossed on treble penny stamp paper, if the action be in case, you may indorse thereon, "That in case judgment be given for the plaintiff, a writ of inquiry will be executed on such a day," as well as upon a joinder in demurrer. *Pract. Reg. C. P. 443. Long v. Lingwood.* And if the defendant's attorney does not pay for same, sign judgment. If he pays for the issue, then get a roll from the prothonotaries of the same term issue is joined; enter the whole issue thereon, file warrants of attorney; then take the roll to the prothonotaries, pay for the entries according to the length or count, and docket same; leave it with Mr. *Sherwood*, with a fee of 3s. 4d. who will take such roll to *Westminster*; the secondary will then order the crier to call the defendant to produce the record mentioned in the plea; at night draw up rule with the secondary, pay 8s. 6d; take a treble penny stamp paper, enter part of the declaration thereon, and then go to the prothonotaries, and the clerk will sign interlocutory judgment; pay prothonotary 2s. clerk of the judgments 2s.; then proceed to execute inquiry, if notice is given on the back of the issue; but if not, you will then give notice forthwith, and proceed as under title *Interlocutory Judgment*.

How to proceed where the action is in case.

But now if the action be on a note or bill of exchange, the court will on motion refer it to the prothonotary to ascertain the damages, and calculate interest without a writ of inquiry. *Longman v. Fenn. 1 H. Black. Rep. 541.* This should be made on an affidavit of the facts. Same in K. B. *Dougl. 316.* So you may proceed as you think proper, either this way, or by writ of inquiry.

If the action be in debt, enter the proceedings on the roll as before; file warrants of attorney, and docket same on the day given by the record; let Mr. *Sherwood* bring down the roll to *Westminster*, as before. In the evening, the secondary will draw up a rule for judgment, which expires in four days; he certifies on the rule that no cause

If in debt.

Issue of Nul tiel Record.

hath been shewn; pay him 1s. then sign your judgment on a double half-crown stamp paper; tax the costs, and sue out execution. The secondary *first* certifies upon the rule, *at the expiration of the four days, that no cause hath been shewn; which certificate you produce to the prothonotaries clerk at the time of signing judgment.*

On a Plea of Nul tiel Record to an Action of Debt on the Judgment in this Court.

A matter of record is of so high a nature that it shall be tried only by itself; and therefore if an action be brought on a judgment and *nul tiel record* be pleaded, it shall be tried by the record itself, 2 *Roll.* 574. 9 *Co.* 25. *a.* And if the issue be upon *nul tiel record* where the record is alledged in the same court, day shall be given in the replication for inspection. If a record has not a material variance, it is not a failure of record, 2 *Gro.* 32. *Pl. Com.* 14. *b.* 3 *Mod.* 228. *Barn.* 274. *Str.* 889. *Hob.* 179. *Cases Temp. Hard.* 131. But if there be a material variance, as debt on judgment of *Hil. T.* it appears to be a judgment of *Easter*, it will be a failure of record. *Fort* 353. *Vide Str.* 892. 1069. *Lut.* 945.

How to proceed.

Upon delivery of the issue, enter the proceedings on the roll, and docket same; which being done on the day given by the record, *have the roll of the judgment upon which you declare ready filed in the treasury*; speak to Mr. *Hopkins*, or one of the criers, to bring same into court; pay him 6d. Mr. *Stubbs* 2s.; then the secondary on reading the issue joined, and the roll upon which the action is founded, will, in the evening, draw up a rule for judgment, which expires in four days; pay him 8s. file warrants of attorney; the clerk then will mark the judgment paper, which must be on a double 2s. 6d. stamp paper, and sign judgment at the prothonotaries on a double half-crown stamp paper; pay

pay prothonotaries 3s. 4d. clerk of the judgments 2s.

N. B. Where any person pleads a judgment or matter of record in the same court, the party so pleading the same shall, upon demand, give the attorney for the plaintiff a note in writing of the term and number roll whereon such judgment or matter of record is entered and filed; and in default thereof, such plea is not to be received.

Term and number roll to be given.

The defendant pleaded a recovery in the same court, instead of replying *nul tiel record*, the plaintiff obtained a rule for the plea to be rejected, unless oyer was given of the judgment according to *Carthew*, 453. 517. *Hunter v. Wiseman*. 2 Str. 823.

If prior recovery in same court is pleaded.

Upon the issue of *nul tiel record*, if the record be in a county palatine, there shall be a writ to the chamberlain to certify, &c. *Cliff. Ent.* 148.; the like if it be in an inferior court, *Bro. Vad. Mecum*, 244. If the officer does not, there shall be a rule for that purpose. *Palm.* 562.

County palatine.

The Court of Chancery may issue a *certiorari* to the King's Bench as if debt brought in the Common Pleas, upon a judgment in the B. R. defendant pleads *nul tiel record*, the plaintiff may have a *certiorari* out of Chancery to send the record thither; and the same may be sent after by *mittimus* into the Common Pleas, notwithstanding the general rule, that a record in B. R. shall not be moved out of that court into any other court. *Cro. Car.* 297. Dy. 187. *Vide* 2 *Saund.* 344. *Vide* *San.* 97. 99.

Certiorari.

N. B. The *certiorari* must first be made out and returned before a *mittimus* can issue.

In this court you cannot, after once a plea has been pleaded, plead any other, as you do in the King's Bench, without special leave of the court.

Replication, Rejoinder, &c.

To compel
plaintiff to
reply, &c.

THERE is no precise time fixed for replying, rejoining, &c. the party who is to do the act gives a rule for that purpose, and the other must, within four days, reply, &c.; if not, a demand being made in writing, judgment of *nonpros*, for want thereof, may be signed; and in order to compel the plaintiff to reply, &c. a rule is to be given for that purpose, thus, *Denn v. Fenn. Rule to reply. A. K. attorney.* Take this to the secondary's office, Mr. Skinn, pay 1s. 10d. which expires in *four days* (if the proceedings have not laid dormant *four terms*); then make a demand thus:

Demand.

In the Common Pleas, Denn v. Fenn. The defendant demands a replication in this cause, by yours, &c.

A. K. Attorney for the Defendant.

When the time is expired, and the replication is not delivered, search first at the prothonotaries office, if filed; if not, sign judgment of *nonpros* on a double half-crown stamp paper; file warrants of attorney as in other cases.

If no proceeding
for four terms.

If no proceedings have been had for *four terms*, then there must be a whole term's rule to reply given, &c. in the same manner as is stated on a rule to plead after four terms, p. 281. (unless the cause has been staid by injunction or privilege); and it must be given *before the effoign day*. The rule to be given the day after the end of the term.

Within what
time a rule may
be given.

A rule to reply, rejoin, &c. may be given at any time in term, or within *sixteen days after*, unless in *Easter term*, then in *ten days*.

Rejoining gratis.

By rejoining gratis is meant rejoining without the common four days rule to rejoin. *Maurice v. Engier. Barnes 271.*

No leave to reply
several matters.

You cannot have leave to reply several matters; courts have never construed the *Stat. 4 & 5 Ann.*

to

to extend to other pleadings than *pleas*. *Barnes* 364.
Whitby v. Chapman.

But in replevin you must have a rule to plead in bar several matters.

Proceed in the same way to urge defendant to rejoin, plaintiff to surrejoin, and so on till the issue be joined.

N. B. If you want time to reply, &c. a judge's summons may be had for that purpose, and draw up the order as in other cases.

In the K. B. a rule to reply is given by the master, and entered with the clerk of the rules; and afterwards a copy of the rule is served on defendant's attorney, but no demand of replication is made, the copy of the rule being deemed sufficient. *Vide my 5 edit.* 287. King's Bench.

Demurrer.

Demurrer confesses the facts as stated. Vide m, K. B. Pract. 5 edit. 294.

Either general or special. Co. Lit. 72. 10 Co. 88.

After demurrer joined, the judges to give judgment according to right, without, &c.

IT has been already observed in the historical part of the proceedings in this court, that a demurrer confesses the facts as stated by the opposite party to be true; but denies that by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse according to the party which first demurs, *demoratur*, resists or abides upon the point in question. p. 57.

A demurrer is either *general* or *special*, and both must be signed by a serjeant; and in case of exception to the *form* or *manner of pleading*, the party demurring must set forth the cause of demurrer, or wherein he apprehends the deficiency to consist, which is called a *special demurrer*, *R. M.* 1654. f. 20.; but by a general demurrer the party does not shew any particular causes of demurrer: for if in the pleadings a matter is insufficiently alledged, so that the court cannot give certain judgment upon it, a general demurrer will suffice; and for want of substance a general demurrer is good. *Hob.* 301.

A general demurrer confesses all matters of fact well pleaded. *Co. Lit.* 72. a. If a man demurs specially, he waives all other matters, and relies upon one particular point. *Plow. Com.* 66. a.

By statute 27 *Eliz. c. 5.* It is enacted, that after demurrer joined, the judges shall proceed and give judgment according as the right shall appear, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or cause of proceeding (*except those only which the party demurring shall specially and particularly set down and express with his demurrer*); and that upon such demurrer joined and entered, the court shall amend all such imperfec

imperfections, defects, and wants of form, other than those which the party demurring shall particularly assign.

The causes assigned on demurrers ought not to be involved in general expressions of *double, negative pregnant*, uncertain want of form, &c. but specially shewn, that the other side may join in demurrer, amend on paying costs, or discontinue. Rule M. 1654. *Mills*, 29.

By the 4 & 5 Ann. c. 16. No exception shall be taken on a *general demurrer* of an immaterial traverse, default of entering pledges upon any bill or declaration, default of alledging of the bringing into court any bond, bill, indenture, or other deed mentioned in the declaration or other pleading; default of alledging of the bringing into court letters testamentary, or letters of administration, the omission of *vi et armis, et contra pacem*, or either of them; or the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or for not alledging *prout patet per recordum*, or matters of the like nature. But for these defects a *special demurrer* must be delivered over.

These exceptions shall not be regarded on a general demurrer.

Defendant cannot demur to a declaration in debt, because it states, he was attached to answer instead of *summoned*. *Barnard v. Moss*. Hil. T. 1788. C. B. *Vide Str.* 225. *Rep. temp. Hard.* 189. 184.

This court never permits a defendant to plead over after judgment in demurrer, for they always hold it strict, *per Gould J. Barnard v. Moss*. But upon payment of costs, and admitting the plaintiff's right to the tithes (except the value), defendant was permitted to plead the general issue.

Never permit defendant to plead over.

A general demurrer, as well as a special one, must be signed by a serjeant; for the first supposes real matter of law to be argued. *Douglas v. Child*. E.T. 33 Geo. 3. *Allen v. Hall*. S. Determ. After it is signed, must be engrossed on a treble penny stamp paper, and either filed with the prothonotaries (*for which pay 2s.*) or delivered over to

How to engross and deliver it.

May amend.

If plaintiff makes up the book.

If defendant demurs to declaration, he shall accept notice of executing inquiry on back of joinder; or when plaintiff is obliged to demur to plea, then on back of such demurrer.

Judgment for not paying for issue or demurrer book.

the opposite attorney; if it be a demurrer for want of form only, the attorney may, on payment of costs, have leave to amend by a summons before a judge.

If the defendant demurs, and the plaintiff wishes to proceed to argument, then he makes up the book, containing the declaration, demurrer, and joinder; delivers it to the attorney on the other side; who is to pay for same after the rate of 4*d.* per sheet, besides the duty, and also for entering his pleadings 8*d.* per sheet, and warrants of attorney.

By rule *Trin. 10 Geo. I.* It is ordered, that in all cases where the defendant demurs to the plaintiff's declaration, the defendant's attorney, or clerk in court, shall be obliged to accept of notice of executing the writ of inquiry on the back of the joinder in demurrer. And in case where the defendant pleads such a dilatory plea that the plaintiff is obliged to demur to, that in such a case the defendant's attorney, or clerk in court, shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer.

Court held, that in all cases the plaintiff's attorney may sign judgment for refusing to pay for the copy of an issue, or demurrer book; except where the defendant is a prisoner; and in that case he is restrained from signing it only where no attorney appears to be concerned for the prisoner. *Lawson v. Hambleton. Cooke's Rep. 35.*

How to proceed on Part of Defendant.

If the plaintiff's attorney will not deliver the book for argument, how to proceed.

But if the plaintiff's attorney will not join in demurrer, or deliver the demurrer book with the joinder thereon, then, in order to compel him to join in demurrer, a rule must be given at the secondaries for that purpose (pay 1*s.* 10*d.*), which expires in *four days*, a demand in writing must be made thereof the same as a replication; if he delivers the joinder, then, in order to compel him to

go to argument, apply to the secondaries for a rule to enter the issue within four days next after notice, or a *nonpros* will be signed; serve copy on the opposite attorney. If he enters the issue and does not proceed to move for a *consilium*, you may move and proceed to argument the same as the plaintiff: if he does not enter the issue on record in time, then sign a *nonpros*.

How Plaintiff is to proceed.

The plaintiff's attorney having joined in demurrer, and the book delivered, the next step to proceed to argument is to make an entry of the whole proceedings on a roll *of the same term the issue is joined in demurrer*, which you get of the prothonotaries; file warrants of attorney, docket the roll at prothonotaries, pay for the entries 8*d.* per sheet; this done, make a brief on a slip of paper, and write thereon the name of the cause, number roll, and the serjeant's name, (*fee 10*s.* 6*d.**) "*To move for a consilium*" (a day for arguing the demurrer); speak to Mr. *Sherwood* to take it to *Westminster-hall* (*pay 3*s.* 4*d.**), and on the motion being handed to the secondary, he will mark the roll *as read in court* (*pay crier 1*s.**); in the evening go to the secondaries office, and get rule drawn up (*pay 5*s.**), a copy of which serve on the defendant's attorney; and at the time of drawing up the rule, set the cause down for argument with him (*pay 1*s.**); this being done, copies of the demurrer book are to be delivered to the judges, by the plaintiff's attorney, pursuant to the following rule; pay judges clerks 2*s.* each, and copy the book on brief paper, for a serjeant to argue it.

If a *sham demurrer* be delivered nearly at the end of the term, the court will, when you move for a *consilium*, give you the last day of term to argue same; but this must be mentioned particularly by the serjeant.

How to proceed to argument.

This will save at the clerk of the warrants a post terminum.

P. 60.

Sham demur.

Of

Of delivering the Books.

Copies to be delivered.

If attorney of either party does not deliver, the other may.

Now the plaintiff's attorney shall deliver all the demurrer books to the judges two days before argument.

Formerly copies of demurrers were to be delivered to the justices *one week* before argument, two by the plaintiff's attorney, and two by the defendant's attorney. and no argument till the books delivered. *Rule E. 27 Car. 2.* And in case the attorney of either party should not deliver books as he ought, then if the attorney on the other side will deliver books to all the judges *three days* at least before argument, counsel should be heard on his client's behalf at the day appointed, and he should be reimbursed the charges of delivering the two books, which ought to have been delivered by the attorney of the adverse party; which charges the said attorney should be bound to pay upon demand thereof. *Ibid* But now by rule *Mich. 6 Geo. 2.* it is ordered, That the plaintiff's attorney shall deliver *all the demurrer books* to the lord chief justice and the rest of the justices of this court, and the defendant's attorney shall pay the plaintiff's attorney for *two* of the said books, *two days at least before the day appointed for arguing such demurrer*, or the defendant shall not be heard by his counsel when his cause comes on to be argued, unless such payment be made as aforesaid.

Per Cur. For the future, in all demurrer books delivered to the judges, let the *counsel's names* be inserted who signed the pleadings, and let the number roll and day of argument be set down on the outside of each book. *Trin. 17 and 18 Geo. 2. Barnes 164.*

Argument.

If judgment be for the plaintiff, then how to proceed in case.

If on argument judgment goes for the plaintiff, draw up the rule with the secondary, and if the action be in case, trespass, or the like, the judgment is only *interlocutory*, and *not final*; enter it on a treble penny stamp paper, get it marked at the clerk of the warrants, sign same with the prothonotaries,

taries, then give notice of executing a writ of inquiry, proceed to the execution thereof, and to final judgment.

But now, if the action be on a bill or note, you may move to refer it to the prothonotary to ascertain the damages, and calculate interest without the inquiry. 1 *H. Black. Rep.* 541. *Longman v. Fean.* So in King's Bench. *Dougl.* 316.

But if the action be in debt, then draw up the rule at the secondaries, and get a double half-crown stamp paper, enter an *incipitur* thereon, and get it marked by the clerk of the warrants; then take it to the prothonotaries, and the clerk will sign the judgment; pay in all 5s. 4d. tax the costs, and then you are at liberty to sue out execution.

If in debt.

Rule 5s

A demurrer is to be entered on the roll the term it is joined of. *Cortizos v. Munos. Barnes* 328.

Plaintiff obtained judgment upon arguing a demurrer in an action upon the case, and proceeded to execute a writ of inquiry, without getting judgment signed by the prothonotary, the court held same irregular, and set aside inquiry. *Barnes* 229. *Mac Carty v. Parminter.*

Judgment must be signed with the prothonotaries before you can give notice of enquiry.

If there be a demurrer to part, and an issue as to the other part, the issue generally stays till the demurrer is argued; but it may be tried first.

Demurrer to part, and issue as to the other part; demurrer argued first.

Leave was given to withdraw a demurrer and plead issuably on payment of costs, after the plaintiff had lost the benefit of a trial, being the case of an heir, as he would have been liable, *de bonis propriis.* *Hunt v. Packmore. Cooke's Rep.* 141. *Barnes* 155. S. C. So if defendant come in a reasonable time, *Cooke's Rep.* 135.

Leave given to withdraw a demurrer and plead.

But the general practice is, that after a trial lost the court will not permit a demurrer to be withdrawn. *Cooke's Rep.* 141. *per Denton, J.*

In causes in the paper on points reserved the plaintiff's counsel is to begin the argument. *Corderoy v. Reynoldson. Barnes* 155.

Argument.

A a

If

If plaintiff demur, and it is determined in favor of defendant, plaintiff may have leave to withdraw his demurrer and reply. 2 *Wils.* 173. *Anon.*

The regular practice is to deliver the book to the defendant's attorney; if he refuses to accept and pay for it, judgment may be signed for want thereof; if he accepts and pays for it, then plaintiff is proper to move for a *concilium*, and proceed to argument. *Sharpe v. Sharpe.* *Barnes* 163.

A demurrer to the merits is an issuable plea within an order for time.

Debt on bond, plea of *Michaelmas* term, replication not delivered till the 11th of *June*; on the 15th of *June* the defendant obtained a judge's order for time to rejoin till the 21st, pleading issuably, &c. on 21st the defendant demurred, on which the plaintiff signed judgment. Motion to set it aside. *Court held*, That though a frivolous demurrer was not within such order, yet where it is (as here) apparently meant to try the merits of the cause, it is a good issuable plea, *viz.* an issue in law, though not of fact. And as the practice was very quick, even had it been regular, the judgment must be set aside without costs. *Wright v. Russell.* 2 *Black. Rep.* 923.

If issue and demurrer.

If a man demurs to part, and takes issue to the other part; or if the declaration be against two defendants, and one demurs, and the other takes issue; the court shall determine which they please first. *Gilb. C. P.* 67. *Co. Lit.* 172. a.

May try issue first.

It seems to be the practice, that plaintiff may try the issue first. But where the demurrer is first argued, the court will give leave to amend; but after verdict has been found on the issues, and contingent damages found upon the demurrers, you cannot withdraw the demurrer and plead to issue. *Vide Robinson v. Rayley.* 1 *Burr.* 322.

Entering causes to be argued.

It is ordered, that no cause, in any term after the end of this term, be put in the book of this court to be argued after the last day of argument, unless the court be thereupon moved, and shall order it. *R. T.* 12 *Geo.* 1.

No argument on the four last and four first days of the term. N. on same rule; but if it be a sham demurrer, it may be entered of the last day of the term, on motion to the court.

No argument
4 last and 4 first
days.

In the Common Pleas.

Michaelmas Term, in the 34th year of the reign of King George the Third.

Middlesex, (ff.) *John Denn*, late of *Westminster*, in the said county, yeoman, was attached to answer *Richard Fenn* in a plea of trespass on the case (go to the end of the declaration); then say,

A general demurrer book, where the demurrer is to the declaration.

And the said *John*, by *J. T.* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said declaration, and the matters therein contained, are not sufficient in law for the said *Richard* to have or maintain his said action against the said *John*, to which declaration the said *John* hath no need, nor is he obliged by the law of the land to answer; wherefore for want of a sufficient declaration in this behalf, the said *John* prays judgment, and that the said *Richard* may be barred from having and maintaining his aforesaid action thereof against him, &c.

Demurrer.

N. B. A general demurrer, as well as a special one, must be signed by a serjeant. E. 33 Geo. 3. Douglass v. Child.

George Bond.

And the said *Richard* says, That the declaration aforesaid, and the matters therein contained, are sufficient in law for the said *Richard* to have his aforesaid action thereof maintained against the said *John*; which said declaration, and the matters therein contained, the said *Richard* is ready to verify and prove, as the court shall award; and because the said *John* hath not answered the said declaration, the said *Richard* prays judgment, and his damages by occasion thereof, to be adjudged to him, &c. And because the justices here will advise themselves of and upon the premises, before they give their judgment thereon, day is therefore given to the said parties here, until in ———, to hear their judgment thereon, for that the said justices here are not yet advised thereof, &c.

Joinder.

A rejoinder should be signed. *Lanston v. Tuckwell*. Barnes 156.

C. Runnington.

A a 2

And

Demurrer to a
plea.

To be signed,

And the said *A.* as to the said plea of the said *C.* by him above pleaded in bar, says, that the plea aforesaid, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law for the said *C.* to bar the said *A.* for having or maintaining his aforesaid action thereof against him the said *C.*; and that the said *A.* is not under any necessity, nor is he bound by the law of the land, in any manner to answer thereto, and this he is ready to verify: wherefore, for want of a sufficient plea in this behalf, the said *A.* prays judgment, and his damages, by reason of the premises, to be adjudged to him, &c.

Demurrer to a
replication.

And the said *John* says, that the said plea of the said *Henry*, by him above pleaded by way of reply to the said plea of him the said *John*, by him above pleaded in bar, and the matters therein contained, are not sufficient in law for him the said *Henry* to have or maintain his aforesaid action thereof against him the said *John*; and that the said plea so pleaded in reply to the said plea of the said *John* by him above pleaded and set forth, he the said *John* is under no necessity nor is he in anywise bound by the laws of this realm to answer; and this he the said *John* is ready to verify; wherefore, for want of a sufficient replication in this behalf, he the said *John* prays judgment; and that the said *Henry* may be barred from having and maintaining his aforesaid action thereof against him the said *John*. And for causes of demurrer in law, according to the form of the statute in such case made and provided, he the said *John* shews to the court here the following causes, (that is to say,) for that the said plea of the said *Henry*, by him above pleaded by way of reply to the said plea of him the said *John*, by him above pleaded in bar, concludes to the country, whereas the same ought to have concluded to the court with an averment and prayer of damages, and not to the country; and also for that the said plea of him the said *Henry*, by him above pleaded by way of reply to the said plea of him the said *John*, by

Special causes
assigned.

To be signed,

by him above pleaded in bar as aforesaid, is in many other respects imperfect, insufficient, and wants form, &c.

And the said Henry saith, That the said plea by Joinder.
him the said *Henry*, in manner and form aforesaid above by replying, pleaded, and the matter therein contained, are sufficient in law for the said *Henry* to have and maintain his said action against the said *John*, which said plea, and the matter therein contained, the said *Henry* is ready to verify and prove as the court shall award. And because the said *John* hath not answered the said plea, nor in any manner denied the same, the said *Henry* prays judgment and his damages, by reason of the premises to be adjudged to him, &c.
C. R.

And because the justices here will advise themselves of and upon the premises, before they give their judgment thereon, day is given to the parties here until in *fifteen days of Saint Hilary*, to hear their judgment thereon, for that the said justices here are not yet advised thereof. At which day here came as well the said *Henry* as the said *John*, by their attornies aforesaid, and hereupon the premises being seen, and by the justices here fully understood, it seems to the said justices here, that the said replication, and the matters therein contained, are sufficient in law for the said *Henry* to have his aforesaid action thereof, maintained against him the said *John* as the said *Henry* hath above alledged. Therefore it is considered, that the said *Henry* recover against the said *John* his damages, by occasion of the not performing the said several promises and undertakings: but because it is unknown what damages the said *Henry* hath sustained by occasion of the not performing the said several promises and undertakings, it is therefore commanded to the sheriff, &c. (*Vide* title Judgment by default, and final judgment thereon.)

*Curia advisare
vult.*

Continuance
over and judgment for the
plaintiff.

Issue.

WHEN the plea of the defendant concludes to the country, the plaintiff may add the *similiter forthwith*, and deliver issue, and notice of trial: but when the plaintiff's replication concludes to the country, he may join the *similiter*, make up the issue, and give notice of trial forthwith: but if the defendant's attorney *immediately* strikes out the *similiter* and returns the same, with notice indorsed thereon, *that he will file a demurrer in the office*, then the plaintiff will be obliged to give a rule to rejoin.

Plaintiff added *similiter* to the repl. delivered the issue without rule to rejoin, defendant's attorney did not pay for it— judgment signed, and held regular.

The plaintiff's attorney in this cause added the *similiter* to the end of his replication, and delivered the issue with notice of trial to the defendant's attorney, who received it, but did not pay the issue money. In consequence of which, the plaintiff's attorney signed judgment, without giving a rule to rejoin: rule to set it aside, on the ground that a *rule to rejoin ought to have been given*. Court (after consulting the prothonotary, who said that the practice was, not to give a rule to rejoin where the defendant had received the issue with the *similiter* added by the plaintiff, and not struck it out) discharged the rule with costs. *Boone v. Eyr.* 1 *H. Black. Rep.* 254. So ruled in *Watts v. Leverington*. *M.* 31 *Geo.* 3.

Unless issue is paid for,

Unless the issue be paid for *on demand*, judgment may be signed; but a demand must be first made, although the sum is marked on the back of the issue, *contra practice in the K. B.* twenty-four hours is the limited time if the attorney *be absent at the time of the demand*; the practice of both courts should agree as to this point; and the practice of this court (as it now stands) is attended with great inconvenience to the attorneys in general.

If an issue be not paid for on demand and at the time of delivery, the defendant's attorney being absent,

absent, the better way would be (with submission) to say, if not paid for at the opening of the office *in the afternoon of the next day*, plaintiff may sign judgment. The twenty-four hours seem to me to occasion a delay longer than necessary.

In any other case, the issue cannot be made up until there is a complete issue joined between the parties.

How to make up Issue.

In this court, the attornies themselves make up all the issues in form, and deliver to defendant's attorney a copy thereof, on treble penny stamp paper; he paying for the same after the rate of 4*d.* per sheet (72 words) and the duty; besides the entry of his plea, if special, 8*d.* per sheet, if it was not filed, and so rejoinder, &c.; but if the general issue, only 2*s.* and for filing his warrant of attorney 8*d.* Note, if the issue be of the same term with the declaration, and the defendant has paid for one copy of the declaration, he is to pay for a copy of the declaration again, as well as all the other pleadings subsequent to the declaration, although laid down the contrary in *Cocke's Rep.* 91.

How to make up the issue,

But if plaintiff charges more for the issue than he ought, the defendant's attorney must tender the money really due, *Gardner v. Goodall, Barnes* 263. or judgment may be signed.

If more charged,

Judgment was signed because the issue was not paid for, the defendant alledged he charged more than was due, which was admitted. Motion to set it aside. *Court held*, it is sufficient if defendant be ready to pay all just demands. We think the plaintiff's judgment cannot stand, being grounded on an overcharge. But as it does not appear that defendant tendered what was justly due, or declared himself ready to pay it, he is not entitled to costs. Judgment set aside without costs. *Atterbury v. Benson. 2 Black. Rep.* 1098.

If there be a charge for more than is due,

If the plaintiff has entered an appearance according to the statute, he may charge it on the back of the

What defendant's attorney to pay.

the issue; and if the defendant's attorney will not pay for it, he may sign judgment.

Prisoners, when they pay.

The Court held, that in all cases the plaintiff's attorney may sign judgment for refusing to pay for the copy of an issue or demurrer book, except where the defendant is a prisoner; and in that case, he is restrained from signing it, only where no attorney appears to be concerned for the prisoner. *Lawson v. Hambleton. Cooke's Rep. 35.*

The like.

Debt upon judgment, defendant appeared by attorney, and pleaded *nul tiel record*, issue thereon, the plaintiff signed judgment for want of payment of the issue. Motion to set it aside. *Cur.* said, if this had been an issue to the country, we would have set aside judgment on paying costs of the motion, and for the issue; and the judgment was ordered to stand. *Everall v. Mason. 1 Wils. 11.* So in K. B.

In country causes, to whom the issue is to be delivered.

In country causes the issue must be delivered to the agent in town, and not to the attorney in the country; and where it was agreed between the country attorneys, that the issue should be delivered in the country, and afterwards tendered to the agent in town, and not paid for, judgment was signed, and held regular. *Cooke's Rep. 94. Mount-Stephen v. Templer. Ibid. 101.*

Where the defendant pleads by his country attorney, and the issue is not paid for by him, judgment may be signed. *Moore v. Hodgson. Barnes 239.*

Attorney to enter his warrant on record.

Every attorney shall enter his warrant of attorney in every suit upon record in court, on pain of 10*l.* and further punishment by imprisonment at the discretion of the court. 30 *H. 8. c. 30. f. 2. 2 & 3 Ed. 6. c. 32. 18 Eliz. c. 14. f. 3.*

When to be filed.

Warrants of attorney are to be filed of the term wherein any exigent is awarded, demurrer, or issue joined, or judgment entered, which shall first happen, and to be filed upon or before the effoign day of every Trinity term; and within twenty-one days

days after the end of every other term. *R. H.*

14 & 15 Car. 2. reg. 2.

It is ordered, that every plaintiff's attorney who shall prosecute any cause to issue, shall upon the delivery of the copy of such issue, receive of the defendant's attorney the *fee* for *filing* his *warrant* therein; and in case the defendant's attorney shall refuse to pay for the same, the plaintiff's attorney shall sign judgment in like case, as if the defendant's attorney had refused to pay for the copy of the issue, or the entry of his plea; which said plaintiff's attorney shall file as well the defendant's as plaintiff's warrant of attorney, before his making up his record therein. *R. H. 2 & 3 Jac. 2.*

Defendant's attorney on receipt of issue, to pay for filing warrant.

The plaintiff's attorney, in any action or suit, shall file his warrant of attorney with the proper officer the same term he declares; and the defendant's attorney shall file his the same term he appears. *Stat. 4 & 5 Ann. c. 16.*

Plaintiff to file his the term he declares, and defendant the term he appears.

The warrants of attorney are now let alone till the record is going to be passed, or judgment signed. *R. M. 5 Geo. 2.*

Now let alone till issue entered or judgment.

Court held, That defendant's attornies must pay for issue books at their peril; and if they are not to be found, issue books may be left in the office.

Defendant's attorney to pay for issue.

Glascock v. Martin. Barnes 243.

Issue left in the office, notice left under defendant's attorney's chamber door the same day, plaintiff's attorney could not find defendant's attorney that day, but next day found him, and told him of the issue being left in the office, and demanded the money, which was refused, and judgment was signed; court held it regular. *Glascock v. Martin. Barnes 243.*

Issue left in the office, notice to attorney put under his door, next day money demanded, not being paid, judgment signed.

The method of making up the issue in this court, is like that in the King's Bench by original, provided the proceedings are by original.

Making up the issue.

N. B. The practice of this court is to make up the issue *the same term in which it is joined*, although the plea be delivered many terms back.

Michaelmas

Michaelmas Term, in the 34th year of the reign of King George the Third.

Issue by original.

Middlesex, to wit. *Richard Fenn*, late of *Westminster* in the said county, yeoman, was attached to answer *John Denn*, of a plea of trespass on the case (here go to the end of the declaration, "*suit, &c.*").

Then begin a new line, and enter the plea, if it be the general issue, thus:

Plea.

And the said *Richard*, by *Robert Spiggott*, his attorney, comes and defends the wrong and injury, when, &c. and says that he did not undertake and promise, in manner and form as the said *John* hath above thereof complained against him, and of this he puts himself upon the country; and the said *John Denn* doth the like. Therefore the sheriff is commanded, that he cause to come here, in fifteen days of *Saint Martin*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

Award of the venire.

N. B. The award of the venire is on the general return day before the trial, if *for the sittings after term*; if *in term*, then the first general return of the term.

If there are special pleadings, viz. *plea, replication, rejoinder, &c.* they must be entered exactly following each other, as they are delivered; and in the margin of the issue name them, as *plea, replication, rejoinder, &c.*

Where there are two or more issues, how to make up issue.

Where there are two or more issues joined, then, after the words, *and the said plaintiff doth the like*, add these—Therefore as well to try this issue, as the said other issue above joined, the sheriff is commanded, that he cause to come here, in fifteen days of *Saint Martin*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

How to make up an issue, where the defendants plead separately.—In this case, you add to each copy of the issue the two pleas, and join the *similiter* to each of

of them, and then say, Therefore, as well to try the issue above joined against the said *John Denn*, as the said other issue above joined against the said *Job Nowell*, the sheriff is commanded, that he cause to come here, in, &c. (as above.)

How against two, and one lets Judgment go by Default.

Go to the end of the plea pleaded by the defendant, and add the *similiter* thereto; then say, And the said *Job*, in his own person, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *James*, by which the said *James* remains therein undefended against the said *Job*, for which the said *James* ought to recover against the said *Job* his damages, by reason of the premises; but because it is unknown to the court here what damages the said *James* hath sustained by the means aforesaid; and because it is also at present unknown to the court here, whether the said *John* will be convicted of the premises upon which the above issue is joined between the said *James* and the said *John*, or not; and because it is necessary and convenient that there be but one taxation of damages in this suit; therefore let the giving of judgment in this behalf be stayed until the said issue between the said *James* and *John* be determined; and as well to try the issue above joined between the said *James* and *John*, as to inquire against the said *Job*, what damages the said *James* hath sustained in this behalf; the sheriffs are commanded, that they cause to come here, in eight days of the Purification, twelve, &c. by whom, &c. and who neither, &c. because as well, &c.

Entry of judgment by default.

Unica taxatio.

The notice of trial differs in this case from the others. It must be given to both parties, and may be thus: Take notice that the issue joined in this cause between the above-named plaintiff and the above-named *C.* will be tried at the next assizes to be held at *Oxford*, and that at the same time the damages

The notice of trial.

damages will be assessed by the same jury against you the above-named *Job Ray*, in this cause upon the judgment taken by default, dated, &c.

Issue in a County Palatine.

Issue in a county palatine.

If the venue be in a county palatine, there must be an award of a special *venire* and *mittimus*, which will be as follows, after the *similiter* is added: Therefore let a jury be made thereof; and because the said issue between the parties aforesaid ought to be tried by men of the county palatine of *Lancaster*, to wit, of the said county, where the writ of our Lord the King doth not run, and not elsewhere; therefore to try the issue between the parties aforesaid above-mentioned, let the record of the plaint aforesaid be sent to his majesty's justices of the said *county palatine of Lancaster*, so that the same justices, by his said majesty's writ of that county, be duly made out, and to the sheriff of the same county directed; do command the same sheriff, that he cause twelve good and lawful men, of the body of the said county of *Lancaster*, to come before the said justices, at their next general session of assize, to be holden for the said county, after the said record shall be delivered to them; each of whom, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.; and when the verification and issue aforesaid shall there be made and tried, that then the said justices shall send the record of the plaint aforesaid, together with every thing that shall be done thereupon, before them, in his said majesty's court there, to his majesty's justices at *Westminster* here, in a certain day which the said justices shall appoint the said parties to be in the same court, there to hear judgment thereupon.

Welch issue.

If it is a *Welch* issue, to be tried in the next *English* county, the award of the *venire* is thus:

And because the issue aforesaid, between the parties above joined, ought to be tried by men of the

the next *English* county to the said county of *Carmarthen*, and not elsewhere ; and because the county of *Hereford* is the next *English* county to the said county of *Carmarthen*, therefore let a jury of the said county of *Hereford*, &c. come before our justices at *Westminster*, in eight days of the Purification, who neither, &c. to recognize, &c. because as well, &c.

N. B. In a *Welsh* issue, when tried in the next *English* county, the *jurata*, *venire*, and *habeas corpora juratorum*, are the same as if the *venue* was laid in that *English* county.

If there has been a plea in abatement, and judgment of *respondeas ouster* awarded, after which defendant pleads in chief, yet the plea in abatement ought to be entered on the issue, and *nisi prius* record ; for as it is in the plea roll, it must be mentioned in the *nisi prius* record, otherwise it would not appear to be a trial in the same cause, and judgment would be arrested. *Carth.* 447. 5 *Mod.* 399. So if there be a demurrer and issues, all must be entered on the record ; and if demurrer determined first, that must be shewn.

If the sheriff be a party to the suit, go to the end of the *similiter*, then say, " And because it is suggested to the court here, that the said ——— esquire, and ——— esquire, is sheriff of the county of *Middlesex*. It is therefore commanded to the coroners of the said county, that they cause to come here, in eight days of the Purification, twelve, &c. by whom, &c. and who neither," &c. And the *venire* and *habeas corpora* are directed also to, and returned by the coroners ; pay them same as you do the sheriff in all cases.

If there has been a plea in abatement, how to make up issue.

How when the sheriff is a party

Of entering the issue. By rule *Hil.* 11 *Geo.* 1. Every issue shall be entered on record of the term in which it was joined, notwithstanding any consent given by the attornies, or their agents, on either side, to the contrary ; and that whosoever shall offend shall be deemed guilty of contempt of this court,

Entering the issue.

To be entered the term it is joined.

court, and be proceeded against accordingly. The clerk of the treasury is to require any person to produce such proceedings, for the better discovering when issue was actually joined. *Ibid.*

How to compel the Entry of the Issue.

How to proceed. If the plaintiff's attorney delays making the entry, defendant's attorney may get a treasury rule from the secondaries for him to enter the issue on record, "*within four days after notice given*;" pay 4s. 6d. and serve him with a copy thereof; if he does not *docket and carry in the roll complete* before the time expired, (*viz.* four days after the service,) defendant's attorney may sign a *non-pros* for want thereof. If the rule is served on *Friday*, defendant has all *Tuesday* to enter the issue. *Barnes 318. Margerum v. Fenton.*

When rule may be given to enter in town.

If the action be laid in *London, Middlesex*, or in the country, defendant cannot give a rule to enter the issue the *same term it is joined*, but must stay till the next term, unless notice of trial has been given.

How to get time to enter.

And if the plaintiff wants time to enter the issue, he may apply to a judge for a summons for that purpose: pay 2s. serve copy on defendant's attorney, and attend thereon, and the judge, on hearing, will give time for that purpose.

How to enter it.

How to enter the issue to prevent nonpros.

Get a roll from the prothonotaries office, *of the term in which the issue is joined*; make out the warrants of attorney of the same term, on a plain piece of parchment, thus: *In the Common Pleas, Michaelmas term, in the 34th year of the reign of George the Third.*

Warrant of attorney for plaintiff.

Middlesex, to wit. Richard Fenn puts in his place J. U. his attorney, against John Denn, late of, &c. yeoman, in a plea of trespass on the case.

The like for defendant.

Middlesex, to wit. The said John Denn puts in his place John Roe, his attorney, at the suit of the said

said Richard, in the plea aforesaid. Take it to the warrant of attorney office, and file it; pay 8*d.* in debt, case 1*s.* 4*d.* then take the roll to the prothonotaries; pay for the entries 8*d.* per sheet, and docket the same.

N. B. The nature of the action must be expressed on the warrant of attorney, according as the case shall be, as thus: *In a plea of trespass and assault; in a plea of trespass, assault, and false imprisonment; in a plea of trespass; in a plea of trespass on the case; in a plea of trespass and ejectment; in a plea of debt; in a plea of detinue.*

The nature of action to be expressed.

If it is an old issue, you pay 3*s.* 4*d.* more for filing the warrants a *post terminum*.

Trial.

Notice of Trial.

Notice of trial
in the country
ten days at least.

NO cause whatsoever shall be tried at *nisi prius* before any judge or justice of assize or *nisi prius*, or at the sittings at *London* or *Westminster*, where the defendant resides above forty miles from the said cities respectively, unless notice of trial, in writing, has been given at least ten days before such intended trial. Stat. 14 Geo. 2. c. 17. s. 4. And verdict shall be set aside for want of it. *Barn.* 305.

Eight days in
town, if defend-
ant lives within
forty miles.

The practice is, if the defendant lives within forty miles of *London*, eight days notice, exclusive of the day, is to be given, where the venue is laid in *London* or *Middlesex*: but if the venue be laid in the country, then ten days exclusive must be given.

When fourteen
days requisite.

Defendant lived above forty miles from *London*, and plaintiff proceeded to trial at sittings there, upon ten days notice; no defence was made, and defendant insisting that he was intitled to fourteen days notice of trial, moved to set aside the verdict; and had a rule to shew cause, which was made absolute. *Cur.* Before this act, fourteen days notice was the settled practice; and unless necessitated, the court will not be bound by an act made to take a benefit from defendants. The practice or law of the court cannot be taken away but by negative words, viz. there shall be no more than ten days notice; fourteen days notice, notwithstanding this act, still necessary. *Barnes* 305. *Bowler v. Jenkins.* So in K. B.

If one of the defendants reside within the distance of forty miles of *London*, and the venue laid there, though the others do not, eight days notice of trial was held sufficient in K. B. 4 Term Rep. 520.

Arrest in Lon-
don, defendant
lives at Dun-

The defendant a foreigner usually residing at *Dunkirk*, was arrested in *London* the beginning of April,

April, and put in bail. On the 16th of *April*, he left *London*, and went to *Scotland*, and from thence to *Dublin*. On the 18th of *May* declaration delivered to his attorney in *London*, who within four days pleaded the general issue. On the 25th of *May*, the plaintiff delivered the issue with eight days notice of trial for the 3d of *June*, sitting after term. Motion to put off the trial, by *Walker* Serjeant for the defendant, which was opposed, saying eight days was sufficient notice. *Cur.* The Stat. 14 *Geo.* 2. c. 17. requires ten days notice, and the practice of the court fourteen, where the defendant resides above 40 miles from *London*; wherever he happens to be arrested, or wherever the venue is laid. Rule discharged. *Brind v. Torris.* 2 *Black. Rep.* 1205. So determined in *K. B.* 4 *Term Rep.* 552.

kirk, fourteen days notice

Motion to set aside verdict, eight days notice of trial given, and defendant lived in *Ireland*, no defence. It appeared that defendant was in town three months in lodgings at a bagnio. *Cur.* The plaintiff should have given fourteen days notice of trial. Rule absolute. *Gorman v. Boyle.* *Pract. Reg.* 388.

Fourteen days notice of trial, the defendant living in Ireland.

Where a Term's Notice necessary.

It is ordered, In all cases in which there have been no proceedings for four terms, exclusive of the term in which the last proceeding was had, the party who desires to proceed again shall give a term's notice to the other of such proceeding; such notice shall be given before the assign day of the fifth, or other subsequent term; that a judge's summons, if no order be made thereupon, shall not be deemed a proceeding, but a notice of trial, though afterwards countermanded, shall be deemed a proceeding within this rule. *R. E.* 13 *Geo.* 2.

If no proceedings for four terms, a whole term's notice of trial to be given;

If notice be given within the year from the day of the last proceeding, having no regard to the terms, it is sufficient. So in *K. B.* *Vide my*

B b

Instr.

Instr. 5 edit. 308. Notice of trial, or countermand, or a judge's order, is held a proceeding so as to prevent a term's notice. And I take it, a term's notice before the effoign day is good, without a note in writing, previous to that you intend to proceed, by giving such notice of trial. So in K. B. *Vide* my *Instr.* 5 edit. 309.

unless delayed by injunction,

But if the defendant has delayed the cause by injunction, then it being his delay there needs not a term's notice of trial, for the rule only extends to *voluntary delay*, by the plaintiff himself. *Bosworth v. Phillips.* 2 *Black. Rep.* 784. So in K. B. *Dough.* 71. *Hayley v. Ryley.*

Notice necessary though fixed for a certain day.

The trial had been put off last term on motion of defendant to the first sittings in this term. And *Wilson* for the plaintiff, who had given no fresh notice of proceeding to trial, now moved to put it off till the sittings after term. The court granted the rule, but doubted the necessity of the motion, it being certified, that notice of trial must be given by the plaintiff, notwithstanding a special day is fixed by rule of court. *Ellis v. Truster.* 2 *Black. Rep.* 798.

Notice of trial delivered to the gaoler or the turnkey of the Fleet is good. So in K. B. *Str.* 248. On conference with the other courts.

Notice of trial of the issue must be given to the agent in town, but otherwise either way, as also countermands.

Where notice of trial is given on the issue book, it must be given to the agent; because the issue can be delivered no where but in town. *Notices of trial and countermands, notices of executing inquiries and countermands*, may be either given to the attorney in the country, or to the agent in town. Attornies in the country are to take no notices but of trial, inquiries, and their countermands; the countermand of notice of trial may be given either in town or country. *Tasburn v. Havelock.* *Barnes* 306. *M.* 16 *Geo.* 2. *Mountstephen v. Templar.* *Cooke's Rep.* 94.

Sunday reckoned a day.

Sunday is accounted a day in these notices, so it be not *the day on which the notice is given.* If

If the plaintiff gives notice of trial, and proceeds not, he cannot try it without new notice, as before, unless by consent or rule of court. *R. M.* 1654. f. 20.

If notice is given, and plaintiff does not proceed, he must give new notice.

Heretofore, where the plaintiff concluded in pleading *ad patriam* (to the country), he could not give notice of trial till the defendant had joined issue, which he was not obliged to do till a four-day rule for that purpose was expired. But now, in all cases where the plaintiff concludes *ad patriam*, the defendant's attorney must accept notice of trial on the back of such pleading, whether the same be delivered to the defendant's attorney or agent, or left in the proper office, where the same may be left by the course of the court, and such notice shall be as effectual as if issue had been actually joined. *Trin. 2 Geo. 1.*

Where the plaintiff concludes *ad patriam*, defendant bound to accept notice of trial on the back of the pleading.

N. B. Or such notice may be given subsequent.

Ordered, That in every cause where the plaintiff concludes *ad patriam*, and gives notice of trial, on the back of the pleadings (pursuant to the *R. 2 Geo. 1.*), if the defendant does not join issue on such pleading before the rule be out, then, after judgment obtained, the defendant's attorney shall be obliged to accept notice of executing a writ of inquiry, from the time that notice of trial was given on the back of such pleading as abovesaid. *R. Hil. 6 Geo. 1.*

When the plaintiff concludes *ad patriam*, defendant obliged to accept of notice of executing inquiry from the time notice of trial was given.

Notice of trial, or of executing a writ of inquiry, given to a defendant, when his attorney has appeared, is not good notice. *Lee v. Bradford. Barnes 300.* But when his attorney is not known, then the notice must be given to the defendant. *Higgins v. Stewart, Cooke's Rep. 62.*

Notice of trial, or inquiry, given to defendant, good, if his attorney is not known; aliter if he is.

Whereas parties are often put to unnecessary expence and inconvenience by reason of the uncertainty of the notice of trial for the sittings after term at the *Guildhall, London*; and likewise by reason of the late passing of the records with the clerk of the treasury, and of entering the causes in the marshal's book for the sittings after term in

New rule.

Notice of trial after term for London to specify the first sitting or adjourned day, and how many days to be given if for adj. day in all cases.

London and Middlesex: It is therefore ordered, that in every such notice of trial to be given for the sittings after term to be holden at the Guildhall, London, the plaintiff shall specify in such notice whether he means to try the cause at the first day of the sittings after term, or at the adjournment day; and, if the notice shall specify that the cause is not to be tried till the adjournment day, it shall be sufficient to give such notice eight days before the first day of the sittings after term, where the defendant or defendants reside above forty miles from the said city of London; and four days before the said first day, where the defendant or defendants reside within that distance.
R. Hil. 32 Geo. 3.

In the Common Pleas.

John Denn against Richard Fenn.

Notice of trial.

Take notice of trial in this cause, for the sittings after this present Michaelmas term, to be held at Westminster Hall, in the county of Middlesex, dated the day of November 1793.

Yours, &c.

To Mr. C. D. Attorney
for Defendant.

J. L. Attorney for
Plaintiff.

The like for
London.

If it be in London, say, "*At the Guildhall of the city of London;*" if tried at the sittings within term, then say, "*To be tried at the first, second, or last sitting within this present Michaelmas term to be held at Westminster Hall, in the county of Middlesex.*"

If in the country.

If in the country, say, Take notice of trial in this cause for the next assizes to be held at Oxford, in and for the county of Oxford. Dated, &c.
 Yours, &c.

Short notice two days.

Court held, That short notice of trial should be at least as much as is sufficient to countermand a notice, viz. two days. Butter v. Johnson. Barnes 301. Pract. Reg. 444. S. C.

Rule in K. B.
as to short notice.

In the K. B. in country causes, a rule has been made, that where short notice is to be accepted, such notice shall be given at least four days before the

the commission day, one day exclusive, the other inclusive. *E. 30 Geo. 3. Vide my Instr. 315.*

Short notice shall be given but once, and notice can be *continued but once*; but if the full time be given, the word continue shall not vitiate it. *Barn. 292.*

Cannot be given but once.

Court held, That notwithstanding a peremptory undertaking to try, it is necessary to give notice of trial, without which the defendant need not attend; and the prothonotary refused to tax a defendant's costs, in attending at the assizes, in expectation of the plaintiff's trying the cause, as no such notice was given. *Ifield v. Weeks. 1 H. Black. Rep. 222.*

Notwithstanding a peremptory rule, notice must be given.

Countermand of Notice of Trial.

This must be in writing, *Cooke's Rep. 3.* and verbal notice void: and if the action be in *London* or *Middlesex*, and defendant lives within forty miles of *London*, *two days, exclusive of the day* in which the countermand is delivered, are sufficient. So in *K. B. Str. 849.*

Countermand of notice of trial two days in town.

And a countermand in a country cause, though given in town, is good. *Gerry v. Shelston. Co. Rep. 49.*

But if the *venue* be laid in the country, *six days* are to be given at least before the intended trial, *fix.* and before commission day. *Stat. 14 Geo. 2. c. 17.*; or if the *venue* be laid in *London* or *Middlesex*, and the defendant lives above *forty miles* from *London*, *six days*, at least, must also be given. *Vide Barnes 298.* as to this.

In the country *fix.*

Where the commission day was on *Monday*, the countermand given on *Saturday* preceding was held good. *Barn. 305.*

In the Common Pleas. *Denn against Fenn.*

I hereby countermand the notice of trial given you in this cause. Yours, &c.—Which is directed to, and served on defendant's attorney.

Countermand of notice of trial.

B b 3

A notice

May be given to the country at-torney.

A notice of trial may be countermanded in the country. *Barnes* 306. *Tasburn v. Havelock*.

No notice or countermand is good, if given on a Sunday. *Deighton v. Dalton*. *Cooke's Rep.* 15.

After a notice is countermanded, it cannot be continued. *Smith v. Hoff*. *Barnes* 301.

Although the record is made a remanet, yet the notice of trial may be countermanded. *Powey v. Walker*. *Pract. Reg.* 393.

It is said that Saturday for Monday is good. *Stafford v. Thomson*. *Pract. Reg.* 395. *Sed qu.*

Countermand of a void notice of trial, may operate as a new notice, if given within regular time.

There was a four days notice of trial for the fittings in term, which was irregular; and thereupon the plaintiff gave an eight days notice, purporting, that the notice of the trial of this cause was continued till the fittings after term. Motion to set aside the verdict, and was insisted, that the first notice being a nullity, it could not be continued, but that fresh notice should have been given. *Barnes* 97. cited; there was also a rule to be present at taxing costs taken out. *Gould, J.* The first notice is a nullity, and therefore not capable of a continuance: but the second is a good substantive new notice, and gives full and complete time to prepare for trial. I also look upon the rule to tax costs as a waiver. *Blackstone, J.* There is no settled precise form of notice required: sufficient if it apprizes the defendant with certainty, that the plaintiff means to proceed to trial. It is indifferent whether he says *I renew*, or *I continue* the former notice, provided there be sufficient time, according to the rules of the court. I think this in itself a new and good notice. I give no opinion as to the waiver, as I find the officers have doubts about it. The idea of continuing, arose from the rule 1654, which allows a plaintiff, who has given notice of trial at one sitting, but finds himself unprepared, to give fresh notice for the next sitting, though the intermediate time should be less than the rules of the court require upon an original notice. But the word *continue* is not to be found

found in the rule, so that it is not a *technical term*, but a mere *colloquial expression*. Nares, J. of the same opinion. It is not uncommon to construe the rules of 1654, according to the *spirit*, and not the *letter*, as in the case of rules to plead, &c.; and I think this a good original notice; and also that the objection (if any) has been waived. Rule discharged, with costs. *Tyte, assignee of Smith, v. Stevenson*. 2 Black. Rep. 1298. *Vide Barnes* 292. If the full time be given, the word *continue* shall not vitiate it.

Continuance of Notice of Trial.

In London or Middlesex, if notice be given of a trial for one sitting, and the plaintiff be not provided to proceed; if he gives notice before that sitting that he will try it the next sitting, that to be held convenient notice. *R. M. 1654. sect. 21.*

In London or Middlesex, notice may be continued to the next sitting.

Cur. Continuing notice of trial from one sitting to another is like short notice, and notice cannot be continued *but once*, much less from the last sitting to the next term, which is above eight days. It is all one whether the plaintiff says, *I give you notice*, or, *I continue my notice*, provided there be full eight days notice. *Boyce v. Twist and others*. *Pract. Reg.* 396. *Barnes* 292. *S. C.* In the K. B. you can continue only once in a term. *Sir. 1119.*

Notice of trial cannot be continued but once.

Plaintiff's attorney gave notice thus, *I hereby countermand the notice of trial given for the second sitting, and continue the same till the third sitting. Per cur.* After a notice is countermanded, it cannot be continued. Verdict set aside. *Smith v. Hoff*. *Barnes* 301. *Pract. Reg.* 394. *S. C.*

Notice countermanded and continued, contradictory.

There must be two days notice of continuance given, *Monday for Wednesday*. *Price v. Bambridge*. *Barnes* 297.

Two days notice.

I hereby continue the notice of trial given you in this cause; to the sitting after this present *Hilary* term. Dated, &c.

Notice of continuance.

Of putting off the Trial.

If one of the defendant's witnesses be out of the way, and cannot be subpoena'd to come to the trial of the cause, he must apply to the court to put same off, upon payment of costs. This motion requires *notice, and affidavit of the service*, and also affidavit of the absence of the witness, and that he is material, where he is, and when he is come to town, or expected; and the motion must be made *two days before the day of trial*, or the court will refuse it. *Barnes 442. Bourne v. Church. Sellon v. Chamberloyne 444.* The affidavit formerly was obliged to be made by the defendant himself, and by no other person, *Barnes 437. Pract. Reg. 405. Carter v. Uppington*: but lately, the court observing that there might be many cases in which a third person could swear another to be a material witness, and defendant himself could not, they allowed a *third* person to make it; and instanced a factor selling goods for his principal, and employing a porter to deliver them. *Barnes 448. Day v. Samson.*

If materialness of a witness did not appear sooner, trial may be put off after cause called on, *Barnes 452.*; but in such case notice is to be given, and a copy of the affidavit to be produced. So in *K. B. Rep. temp. Hard. 128.*

It appearing, the witness being material was a matter that did not come to defendant's knowledge time enough to move *two days*, before the last day appointed for trial, the same was put off. *Barnes 452. Hart v. Whitlocke.*

If a trial is put off, the practice is only to put it off till the next term, and not for a longer period. *Barnes 440. Stratford v. Marshall.* Although in this case it was put off from *Easter* to *Michaelmas*, because sworn that the witness was gone to sea, and not expected home till *August*.

The court suffered affidavits to be read, taken before a vice-consul abroad, to put off a trial. *Korish v. Kennedy. Barnes 466.*

Take

Take notice, that this honourable court will be moved on *Monday* next, or so soon after as counsel can be heard, that the trial of this cause may be put off until next *Hilary* term, on account of the absence of a material witness on behalf of the defendant.

Notice of motion.

Your's, &c.

In the Common Pleas.

A. B. against *C. D.*

C. D. of, &c. the defendant in this cause, maketh oath and saith, That the issue was joined in this cause, this present *Michaelmas* term; and that notice of trial was given for the last sittings within the said term. And this deponent further saith, That *J. B.* of, &c. is a material witness for him this deponent, in the said cause, as he is advised, and believes to be true; and that he cannot safely proceed to the trial thereof, without the testimony of him the said *J. B.* And this deponent further saith, That he hath endeavoured to find the said *J. B.* out; and that he hath been to the house of the said *J. B.* and was informed that he was gone to *Exeter*, in the county of *Devon*; and that he this deponent hath sent there, for the purpose of subpoenaing him; but that the said *J. B.* is gone from thence, as this deponent hath heard, and verily believes to be true; and that he this deponent cannot get any information where the said *J. B.* is, but is informed that he will be at home in one month; and that he this deponent hopes and expects to be able to procure the presence of the said *J. B.* within the first sittings of next *Hilary* term.

Affidavit to put off trial.

The affidavit to put off a trial must be *positive* as to witnesses being *material*; it must add, that the party cannot *safely proceed without*; but to that, belief is sufficient. *Barn. 441. Vide for the material parts of the affidavit my New Instr. 5 ed. 314. K. B.*

Affidavit must be positive.

It is necessary, first, to shew that the persons are material witnesses; second, to shew that the party applying has been guilty of *no laches*, nor neglect, in omitting to apply to them, and endeavour to procure

What ought to be stated in affidavit.

cure their attendance; third, to satisfy the court, that there is a reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off.

If it appears that the witness went out of town, or abroad, or beyond sea, *after notice given*, the court will not put off the trial for it, as the defendant might have subpoena'd him in time. *Barnes 442. Bourne v. Church.* Affidavit made of the absence of a material witness by the wife of the defendant, held insufficient. *Ibid.* 437. *Gray v. Halton.*

The rule to shew cause is drawn up at the secondaries, pay 5s.; serve copy on the plaintiff's attorney, and *shew the original*; then make affidavit of the service of the rule, "*and at the same time, that you shewed the original rule*:" give brief to a serjeant to make the rule absolute; which being done, draw up rule at secondaries, pay for same 6s. 6d.; get appointment thereon at the prothonotaries to tax the costs.—*N. B.* The costs must be paid forthwith, as the rule is conditional on the part of the defendant to perform.

Costs for not proceeding to Trial.

Where costs of attendance,

In case notice of trial be given, and no proceedings, the defendant, upon motion, to have his costs of his former attendance to be taxed by the prothonotary; unless the plaintiff give the defendant warning in convenient time, that he would not proceed, or shew cause, to be allowed by the court in excuse of such costs. *R. M.* 1654. *Sect.* 21.

Prothonotary may tax,

Agreed by the judges in the *Treasury*, that the prothonotary may tax costs, for not going on to trial at discretion. *Anon. Pract. Reg.* 404.

Costs notwithstanding a *ne recipiatur*.

Costs are to be paid, notwithstanding the defendant enters a *ne recipiatur*, because the default is in the plaintiff in not entering his cause in due time.

time. *Duell, qui tam v. Stow. Cooke's Rep. 60.*
Pract. Reg. 406. S. C.

It appearing that the cause was entered with the marshal, that one material witness was served with a subpoena, and could not attend, and another was disabled by a fall from his horse; the rule for costs for not proceeding to trial was discharged. For here the plaintiff hath made no wilful default; if he had, though he was executor, he must have paid them. *Ogle, exor. v. Moffat. Barnes 133.*

No costs if plaintiff's default is not wilful,

Costs cannot be allowed for a witness, who set out before the countermand of notice of trial. *Hester v. Hall. Barnes 307.*

A witness not allowed costs.

Where there has been a regular countermand, or a reasonable excuse, why plaintiff did not proceed to the trial, costs will not be allowed.

Both plaintiff and defendant gave notice of trial, neither of them went to trial; held both intitled to costs. *Pract. Reg. 405. Reading v. Grafton.*

Where both intitled to costs.

Where the plaintiff or defendant might have prayed a tales, and the cause goes off on that account, costs are in future to be allowed. *Sparrow v. Turner. 2 Wils. 366.*

Tales not prayed, costs.

Of the proceeding for Costs.

It has been determined, and is now the practice of this court, that if the defendant obtains a rule for costs for not going to trial, he shall not have a rule for judgment, as in the case of a nonsuit. *Barnes 316. Ogle v. Moffat.* But if any subsequent lache is made, a judgment, as in the case of a nonsuit, may then be applied for. And as these costs are always allowed in the latter rule, there does not seem any necessity ever to move for the former one; but in case it should be thought requisite, the following is the mode of proceeding: Go to *Westminster*, and apply to the secondaries, who will move for a treasury rule, or give a brief to a serjeant with 10s. 6d. to move for same, which is granted of course, without an affidavit; draw up rule, and serve

If application for costs, cannot move for judgment.

How to proceed.

serve copy with the prothonotaries appointment on plaintiff's attorney; pay for rule 6s. When you attend the prothonotary to tax the costs, you must then have an affidavit of the fact, as follows :

Affidavit to move for costs for not going to trial pursuant to the rule of M. 1654.

A. B. of, &c. the defendant's attorney in this cause, maketh oath and faith, That issue was joined in the said cause in *Trinity* term last past, and notice of trial was given thereon for the sittings after the said term; and that the plaintiff did not proceed to the trial thereof, nor did he countermand the same in due time, according to the rules of this honourable court.

If there be witnesses *extra*, or *subpoena*, you may go on and shew this in the affidavit, as in an affidavit of *extra* costs.

Demand.

The demand of costs to be paid, must be at the same time the rule is served. *Britton v. Dickenson, Barnes* 120.

The rule.

The rule may be drawn up payable to the defendant or his attorney; but if payable to both, and the money on demand is refused, the defendant and his attorney must both join in the affidavit for an attachment.

When costs are taxed.

When the costs are taxed, a demand must be made by the defendant, if the rule is made payable to him; if to *either him or his attorney*, either may make the demand; if to both, then on refusal, make the following affidavit to move for an attachment :

Affidavit of demand and refusal of costs, for not going to trial pursuant to a rule.

J. W. of, &c. attorney for the defendant in this cause, and *Richard Fenn*, of, &c. the above-named defendant, severally make oath and say, And first this deponent *J. W.* for himself saith, That he did yesterday personally serve the above-named plaintiff with a true copy of the rule, and the prothonotary's *allocatur* thereon hereto annexed, and at the same time shewed him the said original rule and *allocatur*; and that he this deponent did, at the same time, demand of him the costs allowed by the said prothonotary on the said rule, but that the said plaintiff

plaintiff did not then, or at any time since, pay the same to this deponent, and the same now remains unpaid to this deponent: and this deponent *Richard Fenn*, for himself saith, That he hath not received the said costs allowed by the said prothonotary on the said rule hereto annexed, but that the same now remains due and unpaid to this deponent.

N.B. In all cases where you move for non-payment of money, when the rule is made payable to the plaintiff or his attorney, both must join, and swear negatively to the receipt at the time of the affidavit being made.

* Motion for an attachment for the non-payment of 8*l.* 8*s.* costs allowed; the affidavit stated, that on or about the 9th of February last, he served the rule with the allocatur, and demanded the costs of plaintiff, who refused to pay. *Per curiam*, The affidavit is insufficient, for the words *on or about*, leave the day of the service and demand uncertain; and it might be on a Sunday, which is *dies non jurid.* So you must amend the affidavit, for there is no rule to shew cause, but an attachment goes at once if affidavit be sufficient. *Brett ats. Wadham. 2 Wils. 227.*

Affidavit of service of rule with allocatur, and demand, on or about such a day insufficient.

Serjeant's fee is half a guinea; draw up the rule, and then make out an attachment against the plaintiff as follows (pay rule 6*s.* 6*d.*):

George, &c. To the sheriff of *Middlesex* greeting: Attach *J. C.* so that you may have his body before our justices at *Westminster*, on Wednesday next after the morrow of *All Souls*, to answer us, of and concerning such things as on our behalf shall be then and there objected against him; and have then there this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of June, in the 33d year of our reign. *Doe v. Roe.* For non-payment of 8*l.* 4*s.* costs, taxed by Mr. Prothonotary *Dickins*, pursuant to a rule of court.
Dated day of 1793.

Attachment.

The

The attachment is signed by the prothonotaries, pay 1s. 4d. seal 7d. warrant thereon 2s. 4d. and is to be returnable on a day certain, though the proceedings are by original.

Pauper.

This court ordered costs to be taxed against a pauper, and declared that a pauper should pay costs for all defaults. *Walker v. Parker. Cooke's Rep.* 47. *Pract. Reg.* 405. The King's Bench contra. *Sir.* 983. 420; but you may there move to dispauper him.

Trial by Proviso.

TRIAL by proviso is fallen into disuse, since the statute 14 Geo. 2. c. 17. where the defendant may proceed to have judgment, as in the case of a nonsuit (unless in some cases).

By stat. 7 & 8 W. 3. c. 32. If any defendant be minded to bring the issue to trial by proviso, (when by course he may) he may of the issuable term next preceding such intended trial to be had at the next assizes, sue a new *venire facias*, to the sheriff by *proviso*, and prosecute the same by writ of *habeas corpora*, &c. with a *nisi prius*, as though there had not been any *ven. fac.* sued out or returned in that cause, and so as often as the matter shall require.

When trial by proviso may be had.

A trial by proviso was ordained by the statute, to the end that the defendant might free himself of suits brought against him, by trying the issue depending between them, in case the plaintiff neglects to try as he ought, by the rules of the court.

For what purpose ordained.

By rule Mich. 1654. sect. 21. If the plaintiff gives notice for a trial, and proceed not, the defendant may take it by proviso according to law, giving notice eight or fourteen days, as the case requireth.

Notice.

That in *London* or *Middlesex*, if no warning for a trial, then the defendant not to take it by proviso, to try it the *same term*; but afterwards he may take it by proviso according to law, giving eight or fourteen days notice of trial, as the case requires.

In London and Middlesex, defendant not to try by proviso, same term.

Ibid. Salk. 652.

The defendant shall not try by proviso, till there be a lache in the plaintiff, except in cases where the defendant is as a plaintiff, as in *Replevin*, *Prohibition*, *Quare impedit*, which are to have return, consultation, and suit to the bishop. *N. on the rule.*

Not to try till there be laches.

The

Record to be made upon one default the next term.

Pract. Reg. 397. as to this.

If once record is carried down, and new trial, must be by *proviso*.

Notice of trial.

Where both give notice, both to have costs.

How *venire* runs.

If once the record has been carried down, defendant must go to trial by *proviso*.

So in K. B.

The standing practice is, to make up the record by *proviso*, upon one default being made, the next term after issue joined. *Williams v. Jones and another. Cooke's Rep.* 101.

If the issue is joined and delivered in *Michaelmas term*, notice by *proviso* may be given in *Hilary term. Barn.* 297.

If the plaintiff has once carried the record down to trial, and a new trial be granted, the defendant cannot move for judgment, as in the case of a nonsuit, but he must make up the record by *proviso. Porzelius v. Maddocks. 1 H. Black. Rep.* 101.

The defendant must give the same notice of trial by *proviso*, as the plaintiff is bound to give him. *Swale v. Leaver. Pract. Reg.* 388. viz. eight or fourteen days. *Barnes* 299. S. C.

Where both give notice of trial and do not go to trial, both are intitled to costs for not proceeding. *Reading v. Grafton. Pract. Reg.* 405.

The *venire* by *proviso* runs thus: After you come to the words, *have put themselves on that jury*, say, *provided always, that if two writs thereof should come to you, one of them only return and execute, and have there this writ. Witnes, &c.*

Where the plaintiff has once proceeded to trial, though a new trial be granted, judgment, as in the case of a nonsuit, cannot be entered; but the defendant must go to trial by *proviso* on the default made by the plaintiff. *Porzelius v. Maddocks. 1 H. Black. Rep.* 100. So in K. B. *1 Term Rep.* 492.; for the statute is complied with in having carried the record down to trial *once*.

Judgment as in case of a Nonsuit.

FORMERLY if the plaintiff did not proceed to trial after issue joined, the defendant was (after a rule given to the plaintiff to enter his issue, and he had done it in pursuance thereof) obliged to have a further rule for a record to be made by proviso, if the plaintiff had made default; but to prevent that expence, the *Stat. 14 Geo. 2. c. 17.* enacts, "That where any issue is or shall be joined in any action or suit at law, in any of his Majesty's courts of record at *Westminster*, great session of *Wales, Chester, Lancaster, or Durham*; and the plaintiffs in any such action or suit have neglected to bring such issue on to be tried according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges, at any time after such neglect, upon motion made in open court (due notice having been given thereof), to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit, unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time for the trial of such issue; and if the plaintiff or plaintiffs shall neglect to try such issue within the time or times so allowed, then and in every such case, the said judge, &c. shall proceed to give such judgment as aforesaid; and all judgments given herein shall be of the like effect as judgments upon nonsuit, and no other." *Stat. 2.*

"Provided that the defendants shall, upon such judgment, be awarded his, her, or their costs, in any action or suit where he, she, or they would, upon nonsuit, be entitled to the same, and in no other action or suits whatsoever. This statute does not extend to a writ of right, so as to give costs to

On the plaintiff's neglect to bring on an issue to trial, the court may give judgment as in case of a nonsuit;

and to have the like force as judgments on nonsuit.

Defendant to have costs.

The statute does not extend to a writ of right.

the tenant." 2 *Black. Rep.* 1093. *Newman v. Goodman.*

This motion cannot succeed in two cases: *First*, if the plaintiff has already taken the record down to the trial, though a new trial be granted; and the next, if he has so done in case it be made a remanet, on conditions not complied with. *Vide 3 Term Rep. K. B. 1.* And it was held, that insolvency is sufficient cause against the rule. *Dougl.* 671. *Vide my Instr. 5 edit. 320.*

How to proceed
to obtain the
judgment.

In order to proceed to obtain this judgment *after issue delivered*, and the plaintiff has not tried his cause within that term (*the same not being before entered on record*), get a *side bar* rule from the secondaries office, for the plaintiff to enter his issue on record, which expires in four days after service; pay 5s. serve copy on the plaintiff's attorney. When the four days are expired, go to the prothonotaries, search with them of the term in which issue is joined; if the issue roll is carried in, then proceed as follows, if not, sign judgment of *non pros.* Which see under title *Non Pros.*

Rule must first
be given to enter
the issue, &c.

Per Cur. In the first place a rule must be given for the plaintiff to enter the issue upon record, which if he fails to do, defendant may have a *non pros* for want thereof. If plaintiff enters the issue, the roll must be produced in court, and thereupon defendant may move for a nonsuit upon the act of parliament. Whenever the court admits the cause shewn by plaintiff, sufficient to discharge the rule, the court appoint a future day for the trial, in country causes at the next assizes, in *London or Middlesex*, at a sitting at a convenient distance. *Diggs v. Price. Barnes* 313.

If the cause
shewn is suf-
ficient, court ap-
point a future
day for trial.

In this court, *notice of motion* is requisite, though in the King's Bench it is not. *Lofi.* 265. That court holds, that the rule to shew cause is notice within the meaning of the act.

Judgment as in case of a Nonsuit.

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In the Common Pleas.

Denn v. Fenn.

Take notice that this honourable court will be moved to morrow, or so soon after as counsel can be heard that the like judgment may be given for the defendant, as in the case of a nonsuit, pursuant to the statute in such case made and provided. Dated this 10th day of November 1793.

N. B. Notice is requisite in this court.

Yours, &c.

To Mr. C. D. Attorney for the Plaintiff.

A. B. Attorney for the Defendant.

In the Common Pleas.

{ *John Denn*, Plaintiff,
and
Richard Fenn, Defendant.

Alexander Brown, of &c. Gentleman, attorney for the above-named defendant, maketh oath and faith, that issue was joined in this cause in *Trinity* term last past, and notice of trial was given for the sitting after the said term, and that the said plaintiff did not proceed to the trial thereof pursuant to his said notice: And this deponent further faith, That he did, on the day of personally serve Mr. *Charles Dodd*, attorney for the plaintiff in this cause, with a true copy of the notice hereto annexed.

Affidavit where notice of trial was given.

That issue was joined in this cause in *Michaelmas* term last past, and delivered to this deponent the day of last past; that no notice of trial was given, nor did the plaintiff proceed to the trial thereof the sittings after the said term, although there was time sufficient to proceed to the trial thereof, since the delivery of the said issue. Vide the case of *Woulfe v. Sholls*, further on, p. 390.

Or thus, if no notice of trial was given.

If the motion is made in the third term after issue joined, a general affidavit, stating that issue was joined in the former term, is sufficient. 1 H. Black. Rep. 282.

In gross affidavit on a 1 s. 6d. stamp paper, swear before a judge, and then speak to Mr. *Sherwood* to have the roll in court; pay him 3 s. 4d.; give

N. B. If roll in the treasury, then get the crier to bring it into court.

C c 2

affidavit

Judgment as in case of a Nonsuit.

affidavit to a serjeant, with a fee of 10s. 6d. and he will move for judgment as in the case of a nonsuit; in the evening draw up rule at the secondaries, pay 5s. 6d.; serve copy thereof on plaintiff's attorney or clerk, shew the original, and on the day for shewing cause, have the affidavit of the service ready, and add these words, "*and at the same time shewed him the said original rule.*" Give affidavit to a serjeant with a guinea, to move to make the rule absolute; which, if no cause shewn, is of course; then draw up rule at secondaries, pay 6s. if of common length; take same with a double half crown stamp paper (make an *incipitur* of the declaration thereon) to the prothonotary's clerk, and he will sign judgment; pay 7s. 4d.; then tax the costs, and take out execution.

A peremptory undertaking to try is alone sufficient to shew against judgment, as in the case of a nonsuit, if it be the *first* default.

Motion for judgment, as in case of a nonsuit, on affidavit that issue was joined in *Easter* term last, and notice of trial for the sitting after that term, and countermanded, that notice of trial was again given for the sittings in *Trinity* term, and again countermanded. Cause was shewn in the first instance, by offering to undertake peremptorily to try at the sitting in or after the present term, but no reason given by affidavit or otherwise, why the plaintiff had not proceeded to trial before, which was objected to as contrary to the practice of both courts. But the *court held*, that whatever might have been the former practice, in all cases where an application was made for the first time, for judgment, as in case of a nonsuit, it was sufficient cause to shew against such an application, to undertake peremptorily to try without alledging any reason for not having before tried the cause: and that in future it should be understood, that the first motion for judgment, as in case of a nonsuit, was only a mode of obtaining a peremptory undertaking. *Mallett v. Hilton. M. 33 Geo. 3.* A like case where only one notice was given of trial previous to this. *Price v. Green.* Same determination same term in another cause.

Judgment as in case of a Nonsuit.

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By these determinations no affidavit is necessary on the part of the plaintiff on the first application: but on the *second application*, it is necessary to shew some reasonable cause why he did not proceed to trial by affidavit, such as *the absence of a material witness*; the *plaintiff's own illness*; that the defendant, by some act of his, hindered him from going to trial, or that the witnesses were ill, or absent, &c. not to be met with, or some other reasonable or unavoidable excuse.

Where a countermand is in due time, court directs costs of the application for judgment on the rule discharged, to abide the event of the trial. But if no countermand, then costs to be paid of the application.

If you shew the absence of a material witness, you must name him, and that all endeavours were used to find him out, and shew when he is to return.

Plaintiff's own illness was held sufficient to prevent judgment. *Clarke v. Gorrill. Barnes 313.*

An action *qui tam* is within the act. *Barnes 315. Sugar qui tam v. Webster.*

Leave to discontinue pending this rule to shew cause is wrong, and rule for judgment absolute. *Lowe v. Peacock. Barnes 316.*

Where the excuse is sufficient, as *two witnesses* being disabled by the gout, the court do not give costs of the application, *aliter*, where it is insufficient. *Jones v. Stephenson. Barnes 316.*

Motion for judgment, as in the case of a nonsuit, the 10th of February 1789. Issue joined in *Michaelmas term, 21 Geo. 3.* Cause shewn was, that issue was in fact joined on the 7th of December, in *M. Vac.* and that a note had been sent to the defendant's attorney, purporting that the plaintiff could not proceed to trial on account of the absence of some of his witnesses. Court said, the application was premature, as the plaintiff had the whole of the term next after that in which issue was joined, to proceed to trial in. Rule discharged

Judgment as in case of a nonsuit.

with costs. 1 *H. Black. Rep.* 123. *Baker v. Newman.* Vide for the practice in K. B. my 5 edit. 318.

King's Bench practice.

It was held in a country cause, though issue was joined early enough in *Trinity* term, to have given notice, yet *Michaelmas* term was too early for this motion, for plaintiff is not bound to give notice till the term succeeding that in which issue is joined. 2 *Term Rep.* 734.

Where issue is joined early in a term, notice of trial must be given in the same term.

Motion for judgment as in case of a nonsuit, issue having been joined within the six first days of last term, *E. 1788*, and no notice of trial given: it was contended that the plaintiff could not take two steps in the same term; that notice of trial is not necessary to be given in the same term in which issue is joined. Court were of opinion against the plaintiff, as there was time enough in the term to have given notice, and therefore made the rule absolute. *Frampton v. Payne. Trin. T. 1788.* 1 *H. Black. Rep.* 65.

Where issue was joined of the last term, and motion of the next, the affidavit should state the day issue was delivered, or notice of trial given.

A rule was obtained for judgment, as in the case of a nonsuit, on affidavit "that issue was joined in last term, viz. *E. 1789.*" The cause shewn in *Trin. term* was, that according to the practice of this court, defendant was not intitled to the judgment, without shewing that issue had been joined early enough in the last term for the plaintiff to have tried his cause in that term. For any thing appearing in the affidavit, issue might have been joined too late for that purpose, that defendant therefore had not stated precisely what was necessary to support the rule. Court said, In the next term such a general affidavit would have been sufficient. Rule discharged. *Woulfe v. Shoals.* 1 *H. Black. Rep.* 282.

Third term.

Though further time be given, yet upon cause shewn may be enlarged. Costs.

Though further time for going to trial hath been given, yet upon reasonable cause it may still be enlarged, notwithstanding the rule be peremptory. *Barnes* 315. *Milton v. Terrill.*

If costs are given of the motion, plaintiff must prosecute the rule, and pay costs, or judgment may be

be signed by leave of the court, as the rule is conditional.

In *Trinity* term, 16 *Geo.* 3. issue was joined. Defendant moved for judgment as in case of a nonsuit; on shewing cause, it was contended, that as no proceedings had been for *twelve months*, neither party could now proceed without a term's notice to the other, which had not been given previous to this motion. But the court held, that the rule of the 13 *Geo.* 2. does not extend to motions of this sort being made previous to the statute, so determined formerly in *Roe v. Dunning*. *Barnes* 308.; but on hearing the merits, the court discharged the rule on the usual terms. 2 *Black. Rep.* 1223: *Manby v. Worthy*.

After a year's acquiescence, judgment, as in case of a nonsuit, may be moved for without a term's notice.

How to proceed after peremptory Undertaking.

If the court let the plaintiff off upon a peremptory undertaking, and he does not bring on the issue to be tried in pursuance thereof, the defendant's attorney may apply for an office copy of that rule, and move the court for the like judgment as in the case of a nonsuit, for not having brought on the trial pursuant to that rule, which will be granted to shew cause; and this court have held, after looking into the statute, that a *new notice of motion* must be given. *Gooch v. Pearson*. 1 *H. Black. Rep.* 527., where the want of it, a rule was refused.

How to proceed for judgment after a peremptory rule obtained.

J. B. of, &c. attorney for the above-named defendant, maketh oath and saith, That this honourable court was moved last *Trinity* term for the like judgment as in the case of a nonsuit; and upon shewing cause, the plaintiff peremptorily undertook to bring on the issue to be tried at the sittings after the said term, whereupon the annexed rule was made: And this deponent further saith, That the plaintiff set down his cause for trial at the said sittings, but withdrew his record, and did not proceed to the trial thereof pursuant to the said annexed

Affidavit.

N. B. Let this be as the case is.

Judgment as in case of a Nonsuit.

rule. Go on, and state affidavit of service of notice of this motion.

Affidavit of service of the notice must be made.

Give this affidavit to a serjeant, with 10s. 6d. to move; in the evening draw up the rule at the secondaries, pay 6s.; serve copy on plaintiff's attorney, make affidavit of the service thereof; give it to a serjeant, fee 1l. 1s. to make it absolute; and then in the evening draw up the rule at secondaries; pay 6s. and sign the judgment as before.

Several defendants.

If there be several defendants, all must apply for the rule. *Say. Rep.* 23. 103.

Judgment cannot now be in replevin.

It is now determined that judgment cannot be moved for as in the case of a nonsuit *in replevin*, inasmuch as on that account each party is *an assor*; and therefore either of them may carry the cause on to trial. *M. 33 Geo. 3. Contra Barn. 317.* The court of King's Bench agree with this practice, *3 Term Rep. 661. Jones v. Concannon.*

Trial at Bar.

TRIALS at bar very seldom happen, and unless it appears to the court, that a question of law of some nicety will arise, and that this will be so complicated with a matter of fact, that the whole matter must be determined by the jury, under the direction of the court, it will not be granted. These trials are appointed by the *stat. of Westm. 2.* 13 Ed. 1. c. 30.
1 T. Rep. K.B. 363. where the cause requires *magnam examinationem.* *And. 271.* The grounds are, *the great value of the subject matter of the litigation, the probable length of the enquiry, and the likelihood that difficulties might arise in the course of the trial.* It has been granted in this court in an action for *crim. con.* upon an affidavit of defendant, that he had upwards of twenty witnesses to be examined, plaintiff having liberty to examine a witness before a judge, and defendant waiving his privilege of parliament. *Barnes 438. Lord Hilborough v. Jefferyes.* They are to be tried by a special jury.

Though the estate is of great value, and the matter intricate, if many witnesses are old and infirm, and the place remote, this court has refused it. *Barn. 447. Andr. 273.*

An action of covenant upon a charter party was tried at the bar by a special jury of the citizens of London, who all consented to be sworn, and waived any privilege as citizens of London, in not being obliged to go out of the city to serve on juries. *Luckyer v. East-India Company. 2 Wils. 136.*

A special jury in London at the bar in Middlesex.

Motion in ejectment for a trial at bar was made before appearance, and granted for the next term, being *Easter term.* If plaintiff's motion had not been received before appearance, no trial at bar could be appointed till next *Hilary term.* *Roe v. Doe, Barnes 455.* But otherwise, it will not be granted

Granted in ejectment before appearance.

Court not bound
by the value of
the premises.

granted till issue joined, as the court may see the matter of difficulty. So in *K. B. Str.* 696.

Cur. We are not according to the course of the court bound down by the value of the premises in question, which is sworn to be 100*l. per ann.* As to strict examination it is necessary in all cases, and is nothing with respect to a trial at bar. When a long cause is to be tried, the judge will take a day extraordinary at the assizes. *Frost v. Wadcock, Barnes* 447.

Motion in *M. T.*
refused to try in
Hil. Term.

Motion made in *M. Term* 1788, for a trial at bar in the next term, which was refused, that term being an issuable term. *Corp. of London v. Corp. of Lynn.* 1 *H. Black. Rep.* 211.

Cannot move till
after issue joined.

After issue joined (except in ejectment) you may move to have a trial at bar (but this cannot be had in *London*, the citizens not being to be brought out of the city); nor are they allowed in issuable terms, nor the same term the motion is made. *Cooke's Rep.* 66.

What affidavit
ought to state in
ejectment.

In ejectment, the affidavit should state, That the estate for which the same is brought is of the value of *per annum*; that there are many witnesses to be produced on each side, several of whom reside in remote parts in *B.* and *W.* and others in *L.* and *M.*; and that deponent is advised, and believes, that the lessors of the plaintiff's title will in a great measure depend on the deduction of a long and intricate course of successions and descents, and the effects and operation of several deeds and family settlements, and that a variety of points of law and other questions will arise at the trial; and deponent conceives, and is advised, it will be necessary that the cause should be tried at the bar of this honourable court by a special jury of the county of *S.* where the estates in question lie, if the court shall so think fit, and not before any one judge of assize.

How to obtain
it.

Upon the above affidavit being made, give it to a serjeant, and he will move for a rule to shew cause,

cause, draw up rule with the secondary, pay him 5s. 6d. serve copy, and shew the original. On the day of shewing cause, make a brief of affidavit, give same, and the affidavit of the service of the rule, with *one guinea* to move, to make it absolute; which, if done, draw up the rule, pay according to the length, because in this rule is contained a rule for a special jury; make two copies thereof. serve one on the under-sheriff, and the other on the attorney of the other side, with the prothonotaries appointment thereon; attend on the prothonotary, and he will name 48 jurors, pay him 2l. 2s. sheriff 2l. 2s.; pay clerk to the prothonotaries 5s. for copy (each side). When this is done, and you are ready to strike the twenty-four, get a fresh appointment on the rule for that purpose from the prothonotary; serve copy of rule and appointment on the opposite attorney; attend prothonotary, and he will strike out at your request twelve on each side. *N. B.* The plaintiff's attorney begins first to strike: this being done, a special *hab. corp. juratorum* is made out.

There must be 3 appointments before you can strike *ex parte*.

Although the trial is appointed by the court, yet the plaintiff is at liberty to countermand the notice of trial, and the same cannot be again brought to trial, unless some day be appointed by the court. So in *K. B. N. on R. M. 4 Ann.*

Though trial is appointed, yet plaintiff may countermand.

Whereas rules for trials at the bar of this court are usually granted one or more terms before such trials are appointed to be heard; and that the writs of *habeas corpora* for summoning the juries for such trials are made out upon *venires* returnable in the preceding term; so that the attornies for plaintiffs in such trials have always opportunities of giving timely notice to this court of the certain days when such trials are to come on: and forasmuch as their neglecting to give such notice, is found to be to the prejudice of other suitors in this court: now, for the preventing of any prejudice or inconvenience that may happen from such negligence, It is ordered, that the attorney for the plaintiff, in every cause,

Rule respecting trials at bar.

Attorney for the plaintiff shall, before essoign of cause,

the term, give notice to the chief prothonotary or secondary of the day it is appointed.

And in case of neglect, then such cause shall not be tried.

Copies of the issues tried at bar to be delivered to the judges.

New trial.

As to costs.

cause, which in such case shall come to be tried at the bar of this court, shall, *before the assign day of the term in which such cause shall be appointed to be tried*, give notice to the chief prothonotary of this court, or the secondary, of which the cause is to be tried, that the same (as is usual) may be put down in the court book provided for that purpose. And in case such attorneys shall neglect so to do, that then without motion, and the special direction of this court, such causes shall not be tried that term. *R. Hil. 9 Ann.*

N. B. By this rule it appears that the secondary enters the cause as on a demurrer, and a day is fixed by the court on application.

By rule *M. 3 Geo. 2.* It is ordered, That in all causes which shall be tried at the bar of this court, the lord chief justice, and the rest of the justices of the said court, shall respectively have *copies of the issues in the said causes delivered to them four days before the time appointed for trial of such causes.*

The court will grant a new trial after a trial at bar, upon proper cause, the same as in other cases. *Andr. 315. Str. 1105.*

There are cases where trials at bar have been granted, where the court will, if the other party be *poor*, lay the party moving, under terms of receiving *nisi prius* costs, if he succeed; but if the other succeed, he shall have bar costs. *Vide Dougl. 437. Holmes v. Brown*; and if a witness be old, the party moving shall consent that he shall be examined on interrogatories, and the depositions read, if he should die *before trial. Ibid. Vide my Instr. 5 edit. K. B. 321.*

Special Jury.

GIVE brief to a serjeant with the name of the cause, and indorse thereon, "*To move for a special jury*" (fee 10 s. 6 d.); he will sign it, carry it to the secondary, and he will draw up rule (pay him 5 s.); get an appointment thereon from the prothonotary to nominate the forty-eight, serve copy on the attorney of the other side, and the sheriff also must be served; attend prothonotary, and he will nominate the forty-eight (pay prothonotary 2 l. 2 s. sheriff 2 l. 2 s.); when this is done, prothonotary's clerk makes out copies for each party (pay him 5 s.). When you are ready to strike, then apply to the prothonotary for another appointment; serve copy rule, and that appointment on the attorney; attend the prothonotary again, and he will strike out twelve on each side, beginning with the plaintiff first; the clerk then makes copies of the twenty-four, to try the issue, and a special writ of *habeas corpora juratorum* issues for that purpose. In strictness, if defendant moves for the jury, he ought to sue out the writ of *habeas corpora juratorum* (but this is settled amongst fair practisers amicably, which ought always to be the case).

How to apply for a special jury.

Cannot go on ex parte, till the third appointment, either to nominate or strike.

The person, or party, who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury; and shall not have any farther or other allowance for the same upon taxation of costs, than such person, or the party would be entitled unto in case the cause had been tried by a common jury, *unless the judge, before whom the cause is tried, shall, immediately after the trial, certify in open court, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury.* Stat. 24 Geo. 2. c. 18.

No costs of a special jury shall be allowed, unless the judge certify.

Certificate.

The

What costs allowed.

None to take more than one guinea, except where there is a view.

The court declared they would not extend the act further than to the striking; the other reasonable costs relating to the special jury are to be paid and allowed to the party obtaining the verdict in such case. *Eyles Bart. v. Smart. Cooke's Rep. 139.*

No person who shall serve upon a special jury, or be returned, shall be allowed to take for such serving on any such jury, more than the judge who tries the cause shall think just and reasonable, not exceeding 1*l.* 1*s.* (except in causes wherein a view hath been directed). *Same Stat.*

N. B. If a jury be nominated, the change of sheriff makes no difference, for the same jury will do notwithstanding. *Cowp. Rep. 412. Vide my K. B. 5 edit. 325.*

I understand the *talesmen* are now paid the same as the *special jury*; and so they are in the *K. B.* Lord Mansfield said, they served for a special purpose, therefore they ought to be paid the same as the special jurors; formerly it was otherwise.

View.

View may be granted in any action where necessary.

Formerly there could not have been a *view* in personal actions, but upon withdrawing of a juror after they were sworn, and consent of the parties by a rule of court. Now by the act 4 & 5 *Ann. c. 16. s. 8.* it may be granted in any action brought in the courts at *Westminster*, where necessary, the better to understand the evidence upon the trial; in which case the courts may order special writs of *distringas*, or *habeas corpora*, to the sheriff, requiring him to have six of the jurors, or a greater number of them, at the place in question, some convenient time before the trial; who shall have the matter shewn to them by two persons named in the writ of *habeas corpora juratorum*, and appointed by the court; and the said sheriff executing the writ is especially to return a *view* made accordingly.

For

For an explanation of this statute, *vide* my *Instr.*
5 edit. K. B. 326. 1 Burr. 256.

In the Common Pleas.

Trinity Term, in the 33d year of the reign
of King George the Third.

Denn v. Fenn. Wednesday the 19th day of June, The rule is.
1793, upon reading the affidavit of C. D. gent.
It is ordered, at the instance of the plaintiff, That
a special writ of *habeas corpora juratorum*, directed
to the sheriff of *Oxfordshire*, according to the form
of the statute in that case made and provided, shall
issue, by which the said sheriff shall cause the place
in question to be shewn to six or more of the jury,
impanelled and returned to try the issue between
the said parties, or as many more of them as he
shall think fit, to take a view of the place in ques-
tion, on Monday the day of July next, at
eleven of the clock in the forenoon of the same
day; which said jurors shall meet at the house of
John Cook, known by the name or sign of the
Blue Boar in *Oxford*, who shall then and there be
refreshed at the equal charge of the said parties;
and that *John Doe* on the part of the plaintiff, and
Richard Roe on the part of the defendant, named
in the said writ, shall shew the place in question
to those jurors, yet no evidence shall be then and
there given to the said jurors; and the sheriff of
Oxfordshire shall, by a special return upon the said
writ, certify to the justices of assize, that the said
view was had according to the command of the
said writ. On the motion of serjeant *Bond* for the
plaintiff.

By the Court.

Fothergill.

In this court an affidavit is requisite to obtain a
view, and it may be had at the instance of either
party applying; but in the King's Bench it is a
motion signed by counsel of course, and no af-
fidavit.

W. C. of, &c. gentleman, attorney for the said plaintiff, maketh oath and saith, That the plain-
tiff's

Affidavit for a
view.

To be ingrossed
on a treble six-
penny stamp.

In what actions
views are re-
quisite.

How to proceed.

tiff's declaration in this cause is for a trespass supposed to have been committed by the defendants on the plaintiff's land or premises. And this deponent further saith, that he is informed, and verily believes, That the said plaintiff cannot safely proceed to the trial of this cause, without a view first had by some of the jury intended to be impanelled to try the issue in this cause.

In actions for trespass on land, or case for nuisances, a view may be requisite; and in actions for waste, it is granted on the face of the declaration; but for obstructing a water-course, it was denied of course without affidavit. *Anon. Barnes* 467. So that in all other actions—(except waste) affidavit must be made of its being requisite and necessary to have a view; and it is to be given to a serjeant, with a fee of 10s. 6d. to move, draw up rule with the secondary, pay 8s. * apply to the opposite attorney for the name of the shewer, and have your's ready, so that the rule may be properly filled up, and also the house where the jurors are to meet; the day and hour must be inserted.—*N. B.* If the opposite attorney will not name a viewer, you get an appointment from the prothonotary for that purpose on the rule; serve copy and attend: if the opposite attorney does not attend the third appointment, he will name one *ex parte* of your own chusing.

When the rule is drawn up, serve copy on the opposite attorney; leave the original, with the names of the jurors (if special), with the sheriff; if common, he has them, and he will summon the jury, pay him 2*l.* 2*s.*, his fee for attendance 1*l.* 1*s.*, and no evidence is to be given on the view, but the premises only are to be shewn. In town it is not usual to refresh the jury, as heretofore, with dinners, but in the country it is, and at the expence of both parties.—*N. B.* In vacation, you may have a judge's order for a view, upon pro-

In vacation.

* Country affidavit 2*s.* filing.

ducing the affidavit to the judge, by consent; if not, you may have a summons for that purpose; the judge cannot make an order, unless the attorney on the other side consents to it; but if he does not, then the judge will order *the proceedings in the cause to be staid*, and in both cases a serjeant's hand is requisite after the order obtained; fee 10s. 6d. rule 8s. filing order 1s.

Court held, That on a view the *shewers may shew marks, boundaries, &c. to enlighten the viewers*, and may say to them, "*these are the places which on the trial we shall adapt our evidence to.*" If an antient man be produced to the viewers, and he had acquainted them that he had known the place many years, and given an account of the boundary, &c. this would be improper, because it is giving evidence before the trial. *Goodtitle v. Clarke. Barn. 457.*

Shewers may shew marks to enlighten the viewers.

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Record of *Nisi Prius* by Original.

Vide p. 63.
N. B. In an old
issue, the first
placita is to be
of the term the
issue is joined
delivered ;
the second of the
term in which
the cause is to
be tried.

THE record is to contain the whole pleadings, to be engrossed fairly on a double half-crown stamped parchment, and made up by the attorney for the plaintiff (unless the cause is carried down by proviso, then by both attornies, if they think proper); and in this court the *placita* is wrote but once, (*except on the death or change of a chief justice, or it be an old record,*) in which case you write a second *placita* exactly as the first, *of the term* in which the cause is to be tried; therefore it is necessary in all cases to *leave a space for the second placita*.

Record.

Pleas at Westminster before Sir James Eyre Knight, and his companions, justices of our Lord the King, of the bench, of Michaelmas Term, in the thirty-fourth year of the reign of our Sovereign Lord George the Third, by the grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, &c.

Roll 346.

The declaration.

Middlesex, to wit, Richard Fenn, late of, &c. gentleman, was attached to answer John Denn of a plea of trespass on the case, and whereupon the said John, by J. S. his attorney, complains, That whereas, &c. (to the end of the issue verbatim.)

If there be a demurrer to any of the pleadings, and the cause is to be tried *before or after* that be disposed of, all the proceedings must be entered on the *nisi prius* record.

If on a plea in abatement all the pleadings must be entered.

If on a plea in abatement, and a *respondeas custer* is awarded, and afterwards the defendant pleads in chief, and there is a verdict for the plaintiff, yet the pleadings must be entered on record, or it is good

good cause for judgment to be arrested; for, as it must be entered on the roll (which is in court), so it must be mentioned on the *nisi prius* record, otherwise it will not appear to have been a verdict in the same cause. *Ld. Raym.* 329. 7 *Mod.* 51. *contra.*

Assumpsit against two, they sever in pleading; one pleaded bankruptcy, on which issue is joined; the other pleaded a judgment recovered against him and the other defendant. There was a *nolle prosequi* entered not to proceed further against the bankrupt, and plaintiff proceeded to final judgment against the other. On error brought, judgment was affirmed. 1 *Wils.* 89. *Nolle prosequi as to one defendant.*

The plaintiff may enter a *nolle prosequi* as to one defendant any time before the record is sent down to be tried at *nisi prius*, *Salk.* 457.; but it seems that defendant will be intitled to his costs. 3 *Term Rep.* 511. *K. B.* Where one of the defendants was left out in the second count, on demurrer, it was held plaintiff could not enter a *nolle prosequi*, but he might amend. 4 *Term Rep.* 360. *It may be entered before record sent down.*

Middlesex. (ff.) The jury between John Denn, plaintiff, and Richard Fenn, late of, &c. gentleman, in a plea of trespass on the case, is respited here, until in eight days of Saint Hilary (the return of the habeas corpora juratorum, and which should be the next return after the day of trial), unless Sir James Eyre Knight, the king's chief justice of the bench here, assigned by form of the statute in that case made and provided, shall first come on Friday the 29th day of November (the day of the sittings), at Westminster, in the county of Middlesex, in the Great Hall of Pleas there, for default of the jurors, because none of them did appear. Therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of habeas corpora juratorum. And be it known, that the justices here in court, in this same term, delivered a writ thereupon to the deputy sheriff of the county aforesaid, to be executed in due form of law, &c. *Jurata.*

The day of the
assizes.

N. B. If the cause is to be tried in *London*, say,
“on Saturday the 29th day of November at the
“*Guildhall of the city of London.*” If at the as-
sises, “*unless his Majesty’s justices assigned to take the*
“*assizes in and for the county of Oxford shall first*
“*come on the day of March at Oxford, in*
“*the said county, according to the form of the statute*
“*in that case made and provided, for default of the*
“*jurors, because none of them did appear. There-*
“*fore,*” &c. (as before).

A placita on the
removal of the
late chief justice
De Grey.

*Pleas at Westminster before Sir William de
Gray Knight, and his brethren, justices of his
Majesty’s court of Common Bench, on the
morrow of the Holy Trinity, in eight days of
the Holy Trinity, and in fifteen days of the
Holy Trinity, and before Sir Henry Gould,
Knight, and Sir George Nares Knight, jus-
tices of the said court, from the day of the
Holy Trinity in three weeks, in Trinity
term, in the twentieth year of the reign of our
sovereign Lord George the Third, by the
grace of God of Great Britain, France, and
Ireland, King, Defender of the Faith, &c.*

Town and coun-
try how to pais
record.

When the *nisi prius* record is prepared, take it
with the warrants of attorney to the clerk of the
warrants, who will mark the record, then go to the
prothonotaries office, who signs the record; pay
1s. and for entering the issue 2s. a count, or if
special 8d. *per sheet*, unless the entries are before
paid for: the clerk will mark the record, and give
you a roll to enter the pleadings thereon, which
will be at a future day; then go to the clerk of
the treasury, Mr. *Jefferies*, at the chief justice’s
chambers, who will examine and see that the *ju-
rata* is right; he will seal the record; pay him at
the sittings 1s.; at assize 6d.; and also to him as
clerk of the treasury 2s. for the first three sheets,
and 4d. for every other sheet; and 2s. 2d. for the
seal.

seal. If three weeks after term 2s. for a judge's warrant.

Set down the cause with the chief justices marshal; pay him 13s. 9d.; leave the record and *habeas corpora juratorum*, with the sheriff's panel annexed thereto, which you will get returned with him. Records of *nisi prius* for the assizes shall be signed by the prothonotaries, and signed and sealed by the clerk of the treasury within three weeks next after the end of every *Hilary term*, and of every *Trinity Term*, and not afterwards, unless by order. *Trin. 29 Car. 2.* The clerk of the treasury shall not sign or seal any record, unless the same shall be first signed or stamped by the clerk of the warrants. *Hil. 2 & 3 Jac. 2.*

In town how to enter cause.

Apply to the judge's marshal, at the judge's lodgings in the country; deliver him the record, and writ of *habeas corpora juratorum*, with the sheriff's panel annexed; pay him 13s.

How to enter the cause in the country.

N. B. Get *habeas corpora juratorum* returned by the sheriff at the assizes; the *venire* is returned in town by the agent of the under-sheriff; pay 2s. 6d.; which is sent with the record into the country.

Attendance is given to pass records for *London* and *Middlesex*, at the chief justice's chambers in *Serjeant's Inn*, from ten to one in the morning, and from five to seven in the afternoon; and for the assizes at the same time, during the time of the assizes.

Attendance.

All attornies that shall have any records of *nisi prius*, to be heard before his lordship, in the *Guildhall, London*, or at *Westminster Hall*, shall enter the same *two days* at the least exclusive, before the day of trial, or in default thereof a *ne recipiatur* may be entered. *R. E. 1 Jac. 2.*

When *ne recipiatur* may be entered in *London* and *Middlesex*.

Ne recipiatur shall be allowed to be entered for the sittings of *nisi prius* after every term, unless the records of *nisi prius* and writs be made up and brought into court on or before the days and sittings respectively. *Nat. Hil. 8 Geo. 1.*

Ne recipiatur may be entered, unless the record of *nisi prius* be brought in.

Formerly no record to be received after term in *Middlesex*, unless entered within one day after last day of every term; nor in *London*, unless the day before the adjournment day.

All records for the sitting after term shall be passed, and cause entered two days before adj. day.

Time appointed for entering writ and record on the circuits.

Causes to be tried in the order they are entered.

A list to be made by the marshal, and fixed up.

Formerly no record or writ of *nisi prius* would be received at any sittings after term in *Middlesex*, unless delivered to, and entered with the marshal, within a day after the last day of every term; nor at any sittings after term in *London*, unless delivered to, and entered with the marshal the day before the day to which the sittings in *London* should be first adjourned: and every *nisi prius* cause in *London* or *Middlesex* must be tried in the order in which it is entered (beginning with remanets), unless ordered to the contrary by the judges, on reasonable cause shewn. *Not. East. 2 Geo. 3.*

But now by rule 32 *Geo. 3.* It is ordered, that all records of *nisi prius* for the sittings after term, in *London* and *Middlesex*, shall be passed with the clerk of the treasury, and the causes entered with the marshal two days at least before the adjournment day; and in default thereof the defendant shall, after eight o'clock in the evening of the second day, preceding the adjournment day, be at liberty to enter a *ne recipiatur*. The King's Bench adheres to the old rule.

Ordered by all the judges in *England*, that no writ and record of *nisi prius* shall be received at the assizes, in any county in *England*, unless they shall be delivered to and entered with the marshal, before the first sitting of the court, after the commission day; except in the counties of *York* and *Norfolk*, and there the writs and records shall be delivered to and entered with the marshal, before the first sitting of the court, on the second day after the commission day; otherwise they shall not be received: and every cause shall be tried in the order in which it is so entered, without any preference or delay, unless it shall be made out to the satisfaction of the judge, in open court, that it is impracticable or inconvenient so to do; who thereupon may make such order for the trial of the cause so put off, as to him shall seem just. And it is further ordered, that a list of the causes when so entered as aforesaid, shall be made by the marshal, and forth-

with fixed up in some public place in the *nisi prius* court, there to remain during the whole time of the assizes. *R. H. 14 Geo. 2.*

If you set the cause down to be tried for the *first*, *second*, or *last sitting* in term, the same must be entered *two days* before such sitting, including the day in which the cause is entered.

If cause set down in term, must be two days before the sitting.

If the cause is not tried the day of the sitting, you must apply to the marshal to get it made a *remanet*, pay him 4s.; get your *habeas corpora juratorum*, and alter the return to the next return day after the next sittings, and reseal it; pay 1d.; annex it to the record again, and get the clerk of the treasury, Mr. *Jefferies*, to alter the *jurata* to the same return as the *habeas corpora juratorum*; there is no occasion to have a new panel returned, nor a new stamp.

Remanet how to be made.

After you have ingrossed the record, then make out a *venire facias*, and *habeas corpora juratorum*; get the *venire* returned at the sheriff's office in *Middlesex*, *Tooke's Court*, *Curfitor Street*; if in *London*, in *Grocer's Alley*, in the *Poultry*; pay in *Middlesex* 14s. *London* 4s. 4d.; if special 8s. 8d. Annex the panel to the writ of *habeas corpora juratorum*, and pin them to the record.

Venire and ha. corp. juratorum.

George the Third, by the grace of God, of Great Britain, France, and Ireland. King, Defender of the Faith, &c. To the sheriff of *Middlesex*, greeting: We command you, that you cause to come before our justices at *Westminster*, in fifteen days of *St. Martin*, twelve free and lawful men of the body of your county, each of whom having ten pounds of lands, tenements, or rents by the year, at least, by whom the truth of the matter may be the better known, and who are in no wife of kin, either to *John Denn*, the plaintiff, or to *Richard Fenn*, late of, &c. defendant (if the defendant be declared against as executor or administrator, he must be here described as in the pleadings), to make a certain jury of the county between the parties aforesaid, in

Venire facias.

a plea of trespass on the case (*as the action is*), because, as well the said *Richard* as the said *John* (*the party who first takes the issue*), between whom the matter in variance is, have put themselves upon that jury; and have there the names of the jurors, and this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 6th day of *November*, in the 34th year of our reign.

Insert cause of action as it happens.

Insert the cause of action in the *venire*, as the case shall be, thus: If in debt say, in a plea of debt; if in case, in a plea of trespass on the case; if in assault, in a plea of trespass and assault; if for assault and imprisonment, in a plea of trespass, assault, and false imprisonment; if in ejectment, in a plea of trespass and ejectment; if in covenant, in a plea of breach of covenant; if in replevin, in a plea of taking and unjustly detaining his cattle; if in detinue, in a plea of detinue.

Venire where one pleads and the other lets judgment go by default.

Where one lets judgment go by default, and the other pleads to issue, after the words, to make a jury of the county between the parties aforesaid, add these words, as well as to try the issue between the said *John* and *Richard* joined, of a plea of trespass on the case, as to inquire what damages the said *John* hath sustained, by reason of the not performing the said promises and undertakings by the said *S.* made, as for his costs and charges by him sustained in this behalf, whereof it is considered, that the said *John* ought to recover his damages; because, as well the said *S.* as the said *John*, between whom the contention thereupon is, have put themselves upon that jury, and have there the names, &c. Witness, &c.

If the defendant carries down the record by proviso, the writ of *venire* runs thus:

By proviso.

And have there the names of the jurors and this writ; provided always, that if two writs shall thereupon come to you, that you only return one of them to our said justices at *Westminster*, at the time aforesaid. Witness, &c.

You

You carry this writ to the prothonotaries to be signed: pay 1 s. 4 d. seal 7 d.

Take it to the sheriff's office, with the *habeas corpora juratorum*, and get them returned by the sheriff, pay 14 s.

George the Third, by the grace of God, of *Habeas corpora juratorum*, Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the sheriffs of *Middlesex*, greeting: We command you, That you have before our justices at *Westminster*, in eight days of *St. Hilary* (the next return after the trial), or before the right honourable Sir *James Eyre* Knight, our chief justice, assigned to hold pleas in our court of the Bench, by force of the statute in such case made and provided, if he shall first come on Friday the 29th of *November*, at *Westminster Hall*, in your county, the bodies of the several persons named in the panel annexed to this writ, jurors summoned in our court before our justices at *Westminster*, between *John Denn*, plaintiff, and *Richard Fenn*, late of *Westminster*, in your county, merchant, defendant, of a plea of trespass on the case (as the action is), to make that jury; and have there this writ. Witness Sir *James Eyre* Knight, at *Westminster*, the 28th day of *November*, in the 34th year of our reign.

The day of the sittings when you intend to try the cause.

These writs are printed upon a 2 s. 6 d. stamp parchment, and may be had at the stationers in blank. Take the *hab. cor. jurat.* to the chief justice's chambers, *Serjeant's Inn*, with the *venire*, and sheriff's panel annexed thereto; pay for signing *hab. corp.* 1 s. 9 d. seal 7 d. (leave *venire* and panel with him); get a return thereof by the sheriff, pay 14 s.; unless you have already paid for it at the time of returning the *venire*.

If the cause is to be tried in *London*, say, "If he If in London.
"shall first come on, &c. at the Guildhall of the city
"of London."

If

If at the assizes.

If at the assizes, "or before our justices assigned to take the assizes in and for the county of Oxford, if they shall first come, on the day of at Oxford, in the said county," as before.

This rule is to be observed in causes tried in London and Middlesex, for the sitting after term respecting the *teste* and return of the *venire*, and *habeas corpora juratorum*.

Teste of *venire* and *ha. corp.* by original.

Your *venire* must bear *teste* on the first day of the term, on which issue is joined, and returnable the last general return day of the term; and the *teste* of the *habeas corpora* on the *quarto die post* of the return day of the *venire*; and the return thereof should be on the first day of the next term, being the next general return day after the cause is to be tried. N. B. There is no occasion for fifteen days between the *teste* and return of either of these writs. See Stat. 13 Car. 2. c. 2. s. 2. nor can error be assigned on them.

If at the assizes.

If to be tried at the assizes, the *venire* is made returnable the last general return of the issuable term, and telled the first day of that term; the *habeas corpora* will bear *teste* the last day of the term, returnable the first return of the next term after the assizes.

Habeas corpora juratorum for a special jury.

George, &c. To the sheriffs of London, greeting: We command you, That you have before our justices at Westminster, in eight days of St. Hilary, or before the right honourable Sir James Eyre Knight, our chief justice, assigned to hold pleas in our court of the Bench, by form of the statute in that case made and provided, if he shall first come, on the day of at the Guildhall of the said city, the bodies of Thomas Gorman, of, &c. George Peters, of, &c. (here put the names and places of the special jurors from the prothonotaries paper exactly), merchants, jurors summoned in our

our court, before our justices at *Westminster*, &c.
(the same as in the common one).

And if there is a view to be had in the cause, add after the words (*to make that jury*) these: *And in the mean time, according to the form of the statute in such case made and provided, we command you, That you have six of the first twelve of the said jurors, or as many more of them as you shall think fit, to take a view of the place in question, on the day of* at (as in the rule) *in your city, and proceed from thence to view the said place, in the presence of John Doe, on the part of the plaintiff, and Richard Roe, on the part of the defendant, appointed by our court of the Bench, to shew the said place to such of the said jurors as shall come to view the same; and that you make appear to our said justices at Westminster, on the said day, in what manner you shall have executed this our precept, and that you have there this writ. Witness Sir James Eyre Knight at Westminster, the 28th day of November, in the 34th year of our reign.*

If there be a view, add these words.

Counties Palatine.

In actions brought in *counties palatine*, no jury process is issued out of the courts above, a *mittimus* of the record to the justices there, commanding them to cause a jury to be summoned to try the issue between the parties, and return the same when tried to the courts at *Westminster*, being the only writ issued out here on this occasion, as follows:

George the Third, &c. To our justices of our county palatine of *Chester*, greeting: The tenor of certain record before our justices at *Westminster*, between *A. B.* plaintiff, and *C. D.* late of, &c. defendant in a plea of trespass on the case, We send you inclosed herein, commanding that you, (having inspected the same,) by our writ of our said county, command the sheriff of the same county, that he cause twelve free and lawful men of the body of the said county, to come before you at your next session,

Mittimus into a county palatine,

to be ingrossed on a 2s. 6d. stamped parchment.

session, after this writ shall be delivered to you, each of whom having 10*l.* a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into; and who are in no wise related either to the said *A.* or to the aforesaid *C.* to recognize and make a jury of the county between the said parties in the plea aforesaid; because as well the said *A.* as the said *C.* between whom the controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors, so to be impanelled between the said parties, as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid, between the said parties, shall be fully tried; and when the verification and issue aforesaid shall be there made, and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ, before our justices at *Westminster*, at a certain day which you shall appoint to the said parties, to be there to hear judgment thereupon. Witness Sir *James Eyre* Knight, at *Westminster*, the 12th day of *February*, in the 34th year of our reign.

Take this to the prothonotaries; pay signing 1*d.* 4*d.* seal 7*d.*; the *venire* is made out in the county palatine, and annexed to the writ.

If record be lost.

If a record be lost, a new record and writ of *habeas corpus jurat.* may be made out, and verdict returned by order of the court. *Barnes* 466. So in *K. B.* 2 *Str.* 1264.

Subpoena.

If you have witnesses, and they will not appear, make out a *subpoena*, as follows:

Subpoena ad testificandum.

George the Third, &c. To *John Doe*, *Richard Roe*, *John Staples*, and *Henry Flux*, greeting: We command and firmly enjoin you and each of you that laying all other matters aside, and notwithstanding

standing

standing any excuse, you be in your proper persons before Sir *James Eyre* Knight, our chief justice of the Bench, on *Monday* the day of next, at the *Guildhall* of the city of *London*, by nine of the clock in the forenoon of the same day (if at *Westminster*, say, at "*Westminster-hall*, in the county of *Middlesex*"); if at the assizes, say, ("before our justices assigned to take the assizes in and for the county of *Oxford*, at *Oxford* in the said county, by nine of the clock in the forenoon of the same day in the Great Hall of Pleas there,") to testify all and singular what you or either of you know, in a certain cause now depending, and undetermined in our court, before our justices at *Westminster*, between *John Denn*, plaintiff, and *Richard Fenn*, late of, &c. yeoman, defendant, in a plea of trespass on the case, (as the action is,) on the part of the plaintiff; and this you, or any of you, are not to omit, under the penalty upon each of you, of one hundred pounds. Witness Sir *James Eyre* Knight, at *Westminster*, the 28th day of *November*, in the 34th year of our reign.

This is already printed, and may be had at the Stationers, on a 2s. 6d. stamp parchment; no *præcipe* for it is required, but take same to the prothonotaries office, and get it signed, pay 1s. seal 7d.; and each witness must be served with a copy; and if in town, be paid 1s.; but in the country, the party must have his expences tendered him; nor will the court grant an attachment without *reasonable service*, and the witnesses are to have *reasonable notice*.

I do not find an instance in the books of an attachment having issued against a witness for his non-attendance.—This court have said—We shall never lay it down as a general rule, that an attachment shall go; for wilful contempts and acts in defiance of justice, we might grant an attachment. *Stephenson v. Brooke*. *Præf. Reg.* 345. And it was said in *Streich & ux. v. Wheeler*, *Barnes*

N. B. Four witnesses may be put in one subpoena.

Witness must be served personally so as to ground an attachment, and reasonable expences tendered if in the country.

497. and in *Huffe v. Fowke, Barnes* 33. The court denied the rule, and said it is never granted. Plaintiff may bring his action on *Stat. 5 Eliz. c. 9. f. 12.* But in *Brodie v. Tickle, Barnes* 35. the court there said, that in some cases they will grant attachments against witnesses for not attending trials.

Witnesses ought to have a reasonable time allowed them.

The practice in the *K. B.* is to grant attachments on personal service, *Str.* 1054. There ought to be a reasonable time for witnesses to attend so as to put their affairs in such order that their attendance may be as little prejudicial to them as possible: and a tender of reasonable charges, if they come at a distance, ought to be made.

Attachment refused.

Motion for an attachment for non-attendance, affidavit stated that 2*s.* 6*d.* was paid, and a promise to bear all expences. That a place was taken in the coach for her, and she undertook to go. When the coach was ready, she confined herself, and refused to go. Court refused the attachment, saying it might afford a dangerous precedent, by which witnesses coming from their places of abode to attend at trials, might be deprived of the repayment of their necessary expences; the whole of going and returning, and also during their necessary stay there, ought to be tendered to them at the time of serving subpoena, otherwise an attachment would not lie. *Fuller v. Prentice.* 1 *H. Black. Rep.* 49.

If deeds, &c. are in the possession of any one.

If any person has in his possession any deeds, writings, books of account, or other things, which it may be necessary to produce on the trial of the cause, or on the execution of a writ of inquiry, he should be served with a copy of a *subpoena duces tecum*, commanding him to bring with him and produce the same; but if the plaintiff or defendant are to produce, or the attornies on either side, then a notice to them for that purpose, explaining the deed, &c. will be sufficient.

Subpoena duces tecum.

George, &c. as in the former one, as far as the place of trial; then say, And that you bring with you,

you, and produce at the time and place aforesaid, a certain deed or instrument in writing, bearing date, &c. (describe the thing to be produced), and then and there testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain action now in our court of the Bench, depending between (as in the former one.)

Habeas Corpus ad testificandum.

If a witness should be detained in prison, the following *habeas corpus ad testificandum* may be had to bring him into court as an evidence, on leaving which, and paying for the return, the gaoler must bring him up; but there must be an affidavit to ground the writ.

Habeas corpus ad testificandum.

A. B. of, &c. the plaintiff in this cause, maketh oath and saith, That *J. B.* now a prisoner for debt in his majesty's prison of the *Fleet*, is and will be a material witness for this deponent at the trial of this cause; and this deponent further saith, That he is advised, and verily believes, that he cannot safely proceed to the trial of this cause without the testimony of the said *J. B.*

Affidavit in order to obtain *habeas corpus ad testificandum.*

This affidavit must be engrossed on a treble sixpenny stamp, and sworn before a judge, who on reading the affidavit will grant his *fiat* for the *habeas corpus*; engross the *habeas corpus ad testificandum* on a 5s. stamp parchment first, and take same to the judge with the affidavit, and he will indorse his name on the writ; pay him 4s. and 2s. swearing affidavit; take it to the prothonotaries, pay 1s. 4d. signing, seal 7d.; carry writ to the warden (or other gaoler in whose custody the prisoner is), pay him for his return of *habeas corpus* 9s. 2d. if one cause.

George the Third, &c. To the warden of our prison of the *Fleet*, greeting (or to the person in whose custody he is): We command you, That you have the body of *John Wall*, in our prison, under your

Habeas corpus ad testificandum.

your custody, as it is said, detained under safe and secure conduct, by whatsoever name the said *John Wall* may be called in the same, before the right honourable Sir *James Eyre* Knight, our chief justice assigned to hold pleas in our court of the Bench, at *Westminster-hall*, in the county of *Middlesex*, or at *Guildhall*, in the city of *London*, on the day of (if at the assizes, before our justices assigned to hold the assizes in and for the county of *Oxford*, on Monday the day of next, at *Oxford* in the said county), by nine of the clock in the forenoon of the same day, there to testify the truth, according to his knowledge, in a certain cause now depending in our court before our justices; and then and there to be tried between *John Denn*, plaintiff, and *Richard Fenn*, late of, &c. defendant, in a plea of trespass and assault (as the action is), and immediately after the said *John Wall* shall then and there have given his testimony before our said chief justice, to return him the said *John Wall* to our said prison, under safe and secure conduct; and you have there this writ. Witness Sir *James Eyre* Knight, at *Westminster*, the 28th day of *November*, in the 34th year of our reign.

Of examining Witnesses on Interrogatories.

How to apply in term.

If after issue delivered, and notice of trial given, a witness that is material on either side, is going abroad or beyond sea, so that he cannot be had at the trial, the party who wishes for his testimony on an affidavit of the fact, and being a material witness for the defendant, without whose testimony he cannot proceed to trial, may apply to the court two days before the trial, for leave to postpone it till the next term, on account of his absence, but this rule cannot be obtained without consent on the part of the plaintiff: for cross examination cannot be supplied by depositions. *Barnes* 447. *Frost v. Whaddock*. If he refuse to consent, or to admit the fact,

fact, the court will assist the other party by putting off the trial. *So in K. B. Cowp. Rep. 174. Doug. 420.*

I think notice is proper to be given before the motion to the opposite attorney "*To put off the trial on account of the absence of J. B. a material witness for the defendant,*" until the first sitting within the next term; make affidavit of the service thereof, then give affidavit to ground the motion, and of the service of the notice to a serjeant to move, fee 10 s. 6 d.; draw up the rule at secondaries, pay 7 s. serve same and make affidavit of the service, "*and of shewing the original rule;*" give it to a serjeant, with a brief of the affidavit to make absolute, fee 1 l. 1 s.; which, if done, draw up rule absolute at the secondaries, pay for same 7 s. and serve copy thereof on the opposite attorney. *N. B.* Notice must be given on the other side, of the time he is examined, so that the other party may be at liberty to file interrogatories, and cross-examine him on his part.

If it is in vacation, application must be made in a summary way; apply to a judge for a summons for that purpose, pay 2 s.; serve copy on opposite attorney; and when you attend the judge, produce to him the affidavit, though I think it would save time to give a copy at the time of serving the summons, and on attendance, if the attorney consents, the judge will make an order.

How in vacation.

By Stat 13 Geo. 3. c. 63. Where the cause of action arises in *India*, and a suit is brought thereupon in any of the king's courts at *Westminster*, the court is empowered to issue a commission to examine witnesses upon the spot, and a mode is marked out for transmitting the depositions to *England*.

If the cause of action arises in *India*.

After a rule or order is made, the witness is to be taken to the judge's clerk, who examines him, and the interrogatories are to be left there, and he is to be sworn upon them; after he is examined on both sides, the judge's clerk delivers out copies of

After rule made, the witness to be taken to the judge's clerk.

Interrogatories.

the depositions taken, to the attornies, upon payment of 11*d.* per sheet; and for filing the interrogatories, 2*s.*

Interrogatories to be signed.

The interrogatories are to be signed by a serjeant; pay him according to length; but if small 1*l.* 1*s.*; ingross them on a double 12*d.* stamp parchment.

The form of interrogatories on behalf of the plaintiff.

Interrogatories to be administered to John Black, a witness to be produced, sworn, and examined on the part and behalf of John Denn, plaintiff, and Richard Fenn, late of London, merchant, defendant, before Sir Henry Gould knight, one of the justices of our lord the king of the Bench, pursuant to a rule of the said court, made on the day of in the 34th year of the reign of his majesty king George the Third; or if it be by virtue of an order, say (pursuant to an order of the said justice of our lord the king of the Bench, made the day of 1793.)

Imprimis.

Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either, and which of them; and how long have you known them, either, and which of them? Declare the truth, and your knowledge herein.

Last interrogatory.

Lastly, Do you know of any other matter or thing, or have you heard, or can you say any thing touching the matter in question, in this cause, that may tend to the benefit and advantage of the complainant in this cause, besides what you have been interrogated unto? Declare the same fully, and at large, as if you had been fully interrogated thereto. G. B.

Interrogatories for defendant.

Interrogatories to be administered to Richard Fenn, a witness to be produced, sworn, and examined on the part and behalf of C. D. the defendant, at the suit of A. B. before, &c. and in the other.

If a witness going to sea be examined upon interrogatories before a judge, and the trial comes on before he is gone, his deposition shall not be read, but he must appear; for the rule in such case is made on a supposal of his absence. *Salk.* 691, 12 *Mod.* 493.

If the witness does not go after being examined, the interrogatories shall not be read.

A. F. of, &c. mariner, late master of the ship *D.* the above named defendant, maketh oath, That this action is brought against him for an assault, supposed to have been committed by him on the said plaintiff, who was a mariner belonging to the said ship, and on board the ship *L.* in the month of *February* last, when the said assault is charged to have been committed: And this deponent further saith, That *W. S.* of —, merchant, was a passenger on board the said *L.* at the time the said assault is supposed to have happened, and is as this deponent is advised and verily believes a material witness for him in his defence to the said action, and without whose testimony this deponent cannot safely proceed to the trial thereof; and that the said *W. S.* is about to leave this kingdom on *Monday* or *Tuesday* next, or before, as he has informed this deponent, and as this deponent verily believes.

Affidavit to ground motion for a witness to be examined upon interrogatories.

G. R.

Brief.

The brief is instructions to counsel, for supporting the party's case in whose behalf it is made up and delivered, for calling witnesses to prove or disprove such matters as may benefit or prejudice the client, and for properly conducting the cause through the course of the trial; and to this end it should contain *the names of the parties, an abstract of the pleadings, the case truly stated*, with such observations thereon as may be judged necessary and proper; and lastly, *the names of the witnesses*, with a short mention (as an index to the case, by way of proof) of what they respectively know in support thereof, that the counsel may not be at a

Brief.

Brief.

loss to call the proper witness, for proof of particular facts, as may be necessary.

In this brief the names of the plaintiff and defendant are only once used, which is placed at the top of the sheet thus,

Between *John Denn*, plaintiff,
In the Common Pleas. and
Richard Fenn, defendant.

London, (ff.) The plaintiff declares, for that whereas the defendant, &c. here state the counts as short as you can to the end of the declaration: then the plea, replication, rejoinder, &c.; afterwards the case and evidence.

For the benefit of the clerk I have selected a few of the general heads and leading maxims, relative to the law of evidence, in my *Instr. K. B.* 5 edit. 341.

Postea.

POSTEA is a return of the judge before whom the cause is tried, after a verdict of what was done therein, and is indorsed on the back of the *nisi prius* record.

Associate indorses the *postea*, after verdict on the back of record. Vide p. 65.

When the cause is tried at the sittings in *London* or *Middlesex*, the associate in this court keeps the record in his custody, and indorses the *postea* upon the back of it (if the defendant does not within time either move in arrest of judgment, or for a new trial); call on Mr. *Edgell* for same, on the *quarto die post* of the return of the *ha. corp. juratorum*, then get it stamped with a double half-crown stamp at the stamp office; the day you are intitled to sign judgment, go to the prothonotaries office, pay for the signing of judgment 7s. 4d.; take the *postea* to one of the prothonotaries, and he will tax costs thereon.

In the *K. B.* in *London* and *Middlesex*, the associate delivers the record over to the attorney in whose favor the verdict is, which I conceive to be wrong; it ought not to be parted from till the fourth day. And the rule in the *C. P.* with respect to the motion in arrest of judgment, stays the *postea* in the mean time in the hands of the associate.

N. B. There is no rule given for judgment in this court, but you wait the time, *i. e.* the four days, otherwise in the *King's Bench*. *N. on R.* 5 *Geo.* 2.

Every clerk of assize, and the associate to the lord chief justice, shall make returns of *postea*s upon records issuing out of this court, whereupon any proceedings have been by virtue of any writ of *nisi prius*, *disstringas*, or *habeas corpora juratorum*, and cause the same to be delivered to the prothonotaries of this court, upon the *quarto die post* of the return

Clerk of assize and associates shall make returns of *postea*s, &c. to prothonotaries.

turn of the writ of *nisi prius* in Bank, on pain of 20*l.* and shall take the fees due to them respectively for the return of every *postea*, *R.E.* 2 *Jac.* 2.

Postea to be left in the office on signing judgment,

Where final judgment shall be signed upon *postea*s or *inquisitions*, they shall immediately be left with the clerk of the judgments of the prothonotaries, and shall not afterwards be taken out of the office without leave of the court. *R. Trin.* 13 *Geo.* 2.

Postea may be amended by the judges' notes or certificate. *Williams v. Jones. Coke's Rep.* 118.

Postea amended, and four days after to move.

It was ordered, that the associate do amend the *postea* in court; that defendant have four days after the amendment to move in arrest of judgment. *Hankey v. Smith. Barnes* 449.

Either party dying.

If either party die, execution cannot be taken out until a *sci. fa.* issued for that purpose, 8 & 9 *W.* 3. c. 10.

Bankrupt.

But if plaintiff become bankrupt, final judgment may be entered in his name. 2 *Wils.* 358. *Bibbins v. Mantell.* And the King's Bench have held, that even an execution may be sued out in the bankrupt's name; for the bankruptcy did not abate the suit. 3 *Term Rep.* 437. *Waugh v. Austen*; and refused to discharge defendant out of custody on a *ca. fa.*

Of taxing Costs.

Taxing costs if extra.

If there are *extra* costs, an affidavit of the expences is necessary to be made before taxation; in country causes, affidavits are generally made; and if sworn there, one of the secondaries will mark it before the costs are taxed; he is supposed to make an office copy, for which he is paid 8*d.* per sheet, besides stamps; but if the office copy is not wanted, then on payment to the secondary of 8*d.* per sheet, he will permit you to take the original to tax the costs, which the prothonotary keeps, and sends over to the secondary to file; and *N.B.* It is usual to send

send the copy of affidavit to the opposite attorney, for which is allowed 4*d.* per sheet.

It is also usual among fair practisers, to give Notice to tax. the opposite side notice of taxing costs, without a rule; *but if you cannot rely on the attorney*, then apply to the secondaries office for a side-bar rule to be present at taxing, pay 4*s.* serve copy on the attorney of the other side, and he then must give notice.

In the Common Pleas.

Denn v. Fenn.

A. B. of, &c. the plaintiff in this cause, and *Affidavit of increased costs.*
C. B. of, &c. attorney for the above-named plaintiff, severally maketh oath, and say; And first this deponent *C. B.* for himself saith, That notice of trial was given in this cause for the last assizes, to be holden at *Oxford*, in and for the said county, and that he did cause three subpoenas to be issued out on the part of the said plaintiff, and that *A. L.* of, &c. *C. L.* of, &c. *E. T.* of, &c. *G. H.* of, &c. *J. K.* of, &c. (*here insert the names of the witnesses, and their places of abode, with their addition of trade, &c.*) were all of them severally subpoena'd on the part of the plaintiff, and that the place of residence of the said *A. L.* *C. L.* and *G. H.* is distant from this deponent twelve miles: and this deponent further saith, That all the said witnesses were material and necessary for the said plaintiff: and that the said *A. L.* &c. were all paid with their subpoenas 1*s.* each, and that the said *A. L.* &c. (*here again name the witnesses*) were necessarily absent from their places of abode in going to, and returning from the said assizes, three days; and this deponent was also necessarily absent from his place of abode three days; and that the usual place of abode of the said *A. L.* is distant from *Oxford* thirty-seven miles; and that the usual place of abode of the said *C. L.* is distant from *Oxford* ten miles (*go on and shew the distance of every witness from the assize town*): and this deponent further saith, That the said *A. L.* was very
 E c 4 old

old and infirm, and that he was obliged to hire a post chaise for her, from her place of abode to the said assizes, and back again (she the said *A. L.* not being able to travel in any other way), and that he did pay for the same the sum of 5*l.* 10*s.*; and that he did also pay to her for her loss of time, trouble, and expence, the sum of 4*l.* 4*s.*: and this deponent further saith, That he did pay to the said *C. L. E. T. G. H. &c.* for their loss of time, trouble, and expence, the sum of 3*l.* 10*s.*: and this deponent further saith, That his brief consisted of five sheets of paper, and that he did pay to Mr. *Bearcroft* with his brief and clerk 4*l.* 6*s.* 6*d.* and to Mr. *Baldwin* and his clerk 2*l.* 4*s.* 6*d.* and the following court fees: to the marshal for entering the cause, 12*s.*; to the jury, tipstaff, and bailiff, 14*s.*; to the marshal and crier, 17*s.*; and to the associate, 1*l.* 15*s.* 6*d.*: And this deponent *A. B.* for himself saith, That he did pay for the expence of himself and witnesses, pending the said trial, the sum of 5*l.* 10*s.* 6*d.*

N. B. The briefs ought to be produced in all cases.

It is impossible to form a general precedent for an affidavit of increased costs, as every cause varies so much in expence and circumstances; therefore you have nothing more to do than state the facts; but it must be with *certainty*, as the prothonotary cannot ascertain the expences of the witnesses without, and with that you are to shew that every thing is *necessary* and *material* as far as your belief goes, to be produced on the part of your client; and the *place* of abode of your witnesses must also be shewn, with their distance from the place where the assizes are held, and the time they were necessarily going to and returning from the assizes; otherwise they cannot be allowed for.

Costs of remanet allowed in K. B.

The King's Bench determined, that costs of remanet ought to attend the event of the cause unless particularly circumstanced, so as to distinguish

guish it from being within the *reason* and *principle* of the general rule. *Vide* 4 Burr. 1990. *Sadler v. Evans*.

It was ordered by this court, that whenever a cause goes off at one assize, without default of either party, and is tried at a subsequent assize, the costs of the former assize shall be allowed. *Sparrow v. Turton*. T. 7 Geo. 3. Say. 178. 2 edit. So is the practice of the King's Bench. *Burchall v. Bellamy*. H. 11 Geo. 3. K. B. Say. 179.

Now in C. P.
contra *Cooke's*
Rep. 138.

Special Verdict.

A Special verdict is, when the jury find the special matter, and thereupon pray the direction of the court, *Co. Lit.* 226. *b.* And the verdict must always be for the plaintiff, on the point reserved for the opinion of the court. *Barn.* 451. The rule is, if the opinion of the court is for the plaintiff, that the *postea* be delivered to him; if for defendant, that the verdict be entered for him *ex assensu juratorum.* *Barn.* 451.

The facts proved at the trial ought to be stated, and not the evidence of the facts only. *2 Wils.* 163. *Palmer v. Johnson.*

How to proceed
on a special ver-
dict. Vide p.
65.

If there be a special verdict, the plaintiff's attorney with the defendant's generally get it settled, by the two serjeants who sign the same, which is then left with the associate to be copied for each party; pay 8 *d.* per sheet; after it is done, take it to Mr. *Sherwood* at the prothonotaries, who will make six copies thereof, viz. four for the judges, and two for the serjeants on each side; pay for same 2 *s.* 4 *d.* per sheet. This the plaintiff's attorney does, and delivers three to the defendant's attorney; if he does not pay for them, then the plaintiff's attorney may deliver the four to the judges; pay each clerk 2 *s.*; and when it is entered on the roll, give brief to a serjeant with 10 *s.* 6 *d.* to move for a *consilium*, who signs it; take it to the secondaries at *Westminster*, and have the roll in court; they will mark the roll, and in the evening draw up rule for *consilium* with the secondaries; pay 5 *s.*; set the cause down with them, pay 1 *s.* to serve copy of the rule on the opposite attorney; give brief to a serjeant to argue; if judgment is given, draw up rule with the secondary, pay 5 *s.*; then tax the costs as in other cases.

Counsel to sub-
scribe the point
in question.

By rule *M.* 1654, *f.* 23. That on finding special verdicts where the points are single, and not complicated.

complicated, and no special conclusion, the counsel, if required, do subscribe the points in question, and agree to amend omissions or mistakes in the *issue* conveyance, according to the truth, to bring the point in question to judgment.

That unnecessary finding of deeds *in hac verba*, where the question rests not upon them, but are only derivation of title, to be spared; and found shortly according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c.

Ibid.

By rule E. 27 Car. 2. It is ordered, That every attorney shall deliver true copies of the record of special verdicts to the respective justices of this court, by the space of *one whole week* at the least next before the day appointed for such argument; namely, the attorney for the plaintiff, one copy thereof to the lord chief justice, and another to the senior judge; and the attorney for the defendant, like copies on each of the other two justices.

That no argument by counsel on either side shall be heard at the bar, until books be delivered to all the judges: provided nevertheless, that in case the attorney of either party shall not deliver books as he ought, then if the attorney on the other side, for expediting his client's cause, will deliver books to all the judges, *three days* at the least before the argument, counsel shall be heard on his client's behalf at the day appointed; and the attorney delivering books as aforesaid, shall be reimbursed the charges of delivering the two books, which ought to have been delivered by the attorney of the adverse party; which charges the said attorney shall be bound to pay upon demand thereof. *Ibid.*

And lastly, it is ordered, That if the charges of delivering the said two books shall not be paid before judgment shall be given in the cause, the charges of delivering the said books shall be allowed upon taxing costs; and in that case the attorney shall

Deeds to be found according to the substance.

Copies of special verdicts and demurrers to be delivered to the justices one week before the day.

Two by the plaintiff's, and two by the defendant's attorney.

Nor any argument, till the books be delivered.

Attorney on either side may deliver all the books, and shall be reimbursed or allowed it in costs.

If no costs be
had, then by at-
tachment.

shall not be compelled to pay the said costs. But if no costs are to be taxed in the case, then the attorney making default in delivering books as aforesaid, shall be compelled to pay the charges of the copies so delivered by the attorney of the adverse party, by attachment or otherwise as the court shall think fit. *Ibid.*

N. B. The court will refuse to hear counsel upon the argument, unless the books are paid for by the defendant's attorney. *Note* on the above rule, reference to *M. 6 Geo. 2. reg. 3.*

King's Bench
practice.

The delivery of the books to the judges in the King's Bench is *two days* before argument. *N. R. E. 2 Jac. 2.*

The court having delivered their opinion, (and no motion in arrest of judgment being made,) the rule is drawn up with the secondary, and the costs taxed immediately. But the opposite attorney may obtain a rule to be present at the taxing of the costs.

Special Case.

Special case.

Another method of finding a special verdict is when the jury find the verdict generally for the plaintiff, but subject nevertheless to the opinion of the court above on a *special case* stated by the serjeants on both sides, with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expence, and obtains a much speedier decision; the *posita* being staid in the hands of the officer of *nisi prius* (associate) till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen: but as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error if dissatisfied with the judgment of the court upon the point of law.

How to proceed.

If a special case be made, it is settled by the two serjeants and signed; and the associate makes

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copy for each party, pay him 8*d.* per sheet, then give brief to a serjeant to move for a *concilium*; draw up rule for argument with the secondary; serve copy on the opposite party; make four copies of the pleadings and case for the judges; each attorney makes two. The plaintiff's attorney delivers two, viz. *one to the chief justice, and one to the senior judge*; and the defendant's attorney, to the other two judges.

If the facts are not sufficiently set forth in the special case stated, the court will grant a new trial. *Vide 3 Burr. 1773.*

Of Arresting the Judgment.

Arrests of judgment.

ARRESTS of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested, *but for that which appears on the face of the record itself.* Lord Raym. 232. The court after verdict will do every thing they can to help the declaration, and will suppose every thing right, unless the contrary appear on the record, 1 *Wils.* 255. but not after judgment by default, 2 *Burr.* 899.

After verdict, a man may alledge any thing in the record in arrest of judgment, which may be assigned for error after judgment, 2 *Roll. Abr.* 716. So after interlocutory, before the principal judgment, *Cro. Eliz.* 914. 235. And judgment after verdict shall not be arrested for an objection that would have been good on demurrer, 3 *Burr.* 1725.

Motion before appearance day.

Motion in arrest of judgment, in this court, must be made before or upon the appearance day of the return of the *habeas corpora juratorum*, *Barnes* 445. *Lyte v. Rivers.*

King's Bench.

Sunday is not esteemed one of the four days, 4 *Burr.* 2130. in the *K. B.* So I take it to be in this court. The *K. B.* determined that a motion in arrest of judgment may be made at any time before judgment is entered up, and after a rule for a new trial refused. *Doug.* 745. *Taylor v. Whitehead.*

If moved on last day notice.

And if it is moved on the last day of term, there must be notice given of the motion, which will require an affidavit of the service. *Camp v. Gale,* *Cooke's Rep.* 107. *Barnes* 247. *S. C.*

When not to be arrested.

Judgment shall not be arrested, because the defendant's name is put in two counts instead of plaintiff's. 3 *Wils.* 40. *Richards v. Symonds.*

How to move.

If the party moves in arrest of judgment, notice of this motion is requisite, as the rule itself stays

stays the proceeding (*unless it be moved on the last day of term*); the roll should be brought into court upon the motion, if it is entered on record; if not, the record of *nisi prius* being produced in court will be sufficient; for which you will apply to Mr. Edgell to take the record down; pay him 6s. 8d.; pay treasury-keeper 1s., secondary 1s., cryer 6d.; give brief to your serjeant, to move, "*that the entry of the final judgment be stayed until the court shall otherwise order.*" In the evening draw up the rule, which will be in these words: "Upon reading the record of *nisi prius* between the said parties, it is ordered, that the entry of final judgment upon the verdict found for the plaintiff be stayed until this court be moved on behalf of the plaintiff, and shall otherwise order: let notice of this rule be given to the plaintiff, his attorney or agent, and let notice of the motion to discharge this rule be given to the defendant, his attorney or agent;" pay serjeant's fee, one guinea; rule 5s.; serve copy on plaintiff's attorney.

The rule.

If the plaintiff means to discharge the rule, he must give notice thereof thus: "*Take notice, that this honourable court will be moved to morrow, or so soon after as counsel can be heard, that the rule made in this cause the day of last may be discharged.*" Serve copy on defendant's attorney, and make affidavit of the service; give brief to a serjeant, and he will then argue the point; see discretionary.

How plaintiff is to proceed.

If judgment is arrested, then draw up rule in the evening with the secondary (pay 5s.); serve copy on plaintiff's attorney; there are no costs allowed in this case. *Cowp. Rep.* 407.

How to proceed if judgment arrested.

If the rule is discharged, then plaintiff's attorney draws up rule, and may proceed to tax his costs in the usual way.

If rule discharged.

If you move in arrest of judgment on the inquiry, and the same is not taken from the sheriff, give him notice to produce it in court, in order to move for the rule; pay him 6s. 8d.; make affidavit

How to move upon an inquiry.

vit

Rule to be observed in arrest of judgment.

vit of the service, lest he should not produce the same. If the plaintiff's attorney has it, then give him notice to produce it, and make the like affidavit; then proceed as before.

With regard to arrest of judgment upon matter of law, this rule is to be observed, "*That whatever is alledged in arrest of judgment, must be such matter as would, upon demurrer, have been sufficient to overthrow the action or plea.*" But this rule will not hold *à converso*, viz. "*That every thing that may be alledged as cause of demurrer will be good in arrest of judgment; because many omissions and defects, if not taken advantage of in time, are cured after verdict by the statutes of jeofails.*"

If the rule is discharged, then plaintiff's attorney draws up the rule, and may proceed to tax his costs in the usual way, on the inquisition.

New Trial.

NEW trials were granted before 1655. *Str.* 138. 466. Trials by jury in civil causes could not subsist now without a power somewhere to grant new trials. 1 *Burr.* 390.

A new trial is retrying the cause before another New trial, what, jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken in the former verdict on the one side, or the rule of court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no title of blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case. A sufficient ground must, however, be laid before the court, to satisfy them that it is necessary to justice that the cause should be further considered; nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case.

In *Ducker v. Wood*, *Ld. M.* said, That there Power of court was no doubt but that the court had the power of to grant, &c. taking the opinion of a second jury in any case where the damages were excessive; but these questions depended on their own circumstances, on which the court would exercise their discretion. 1 *Term Rep.* 277. Vide 2 *Wils.* 405. *Wils.* 62.

If the party against whom the verdict is obtained Must be moved for before or on the appearance
is, or judgment on inquiry of damages, wishes
F f

day of the return
of the *ba. corp.*
jurat. if by
original.

wishes for a new trial, he must move for the same *within the first four days of the term*, Barnes 446, if the cause be tried *in the vacation*; but if tried *within the term*, then before or on the *appearance day* of the return of the *habeas corpora juratorum*, or inquiry (if by original), unless the foundation of the motion be some matter discovered afterwards, Barnes 443. *Wills v. Bennett. Pract. Reg.* 410. S. C.; but if it be returnable on a day certain, then *four days inclusive of the return day*; and the motion is generally made on an affidavit (*unless it arise from a verdict given contrary to evidence, a misdirection of the judge at nisi prius, 2 Wils. 273. or where the jury have given excessive damages*), of some new matter being discovered since the trial. *How v. Strode.*

If the cause be tried before a judge of another court, there ought to be an affidavit of what passed on the trial. *Barn. 447.*

King's Bench.

In the *K. B.* the motion must be made *within four days of the beginning of the term, including the first day.* *Birt v. Barlow. Doug. 171.*

Though the
strength of evi-
dence was
against the ver-
dict, new trial
refused.

Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the court have granted new trials; but if there hath been a contrariety of evidence on both sides, the courts have never granted new trials, notwithstanding the judge (before whom the cause was tried) hath been of opinion, that the strength and weight of evidence was against the verdict. *3 Wils. 47. Swaine v. Hall.*

Court will not
grant a new trial,
where there has
been a verdict on
the honest side.

After a verdict on the honest and just side of the cause, the court will support it if possible, and not grant a new trial. *2 Wils. 306. Goslin v. Wilcock.*

Will not grant
in penal actions,
&c.

The court will not grant a new trial in actions on penal statutes, *3 Wils. 59. Barn. 466. 1 Wils. 17.*; and it has been so held for more than fifty years past. *Vide Str. 899. 1238.* Nor where there is complete and substantial justice done, *2 Term Rep. K. B. 4.* Nor to let the party into a defence,

sence, of which he was apprised at the first trial, *ibid.* 84. 113. *Vide Str.* 691. *My Instr. K. B.* 355. 1 *Wils.* 98.

In all motions for new trials, it is absolutely necessary for the court to enter into the nature of the cause, the evidence, facts and circumstances of the case, as for a jury. The law has not laid down what shall be the measure of actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances. Torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c. the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be, and generally are considered by a jury, in giving damages.

Seldom granted in actions for torts.

It is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages. *Huckle v. Money.* 2 *Wils.* 206.

After a nonsuit by order of the judge improperly, the court granted a new trial without costs. *New trial granted after a nonsuit.* 3 *Wils.* 146. *Buscall v. Hogg.* So in *K. B.* 4 *Burr.* 1986.

It is said that in ejectment, where a verdict is for the defendant, it is not usual to grant a new ejectment. *Granted now in*

trial, because the plaintiff may bring a new ejectment, and no other disadvantage happens to him; but where the verdict is for the plaintiff, a new trial is often granted. New trials are often granted in ejectment, as well as other cases; where the party praying a new trial would suffer by a change of possession. *Yates, J.* 3 *Burr.* 2225.

A new trial not granted, because the counsel thought it prudent to omit evidence which they had in their briefs, and might have offered in mitigation of damages; nor because another jury, in a cause between the same parties nearly similar, where

New trial not granted, because counsel thought it prudent not to call evidence which they had in their briefs.

where such evidence was offered, gave a different verdict. 2 *Black. Rep.* 802. *Spong v. Hogg*.

Verdicts may be set aside for excessive damages, but not for smallness; and where the damages are not unreasonable, court will not grant a new trial.

Verdicts have been frequently set aside for excessive damages, but never for smallness; and in an action against a tavern keeper for imprisonment a few hours, 300*l.* was given, 2 *Wils.* 160.; so against a journeyman printer, for six hours, 300*l.* 2 *Wils.* 205. *Huckle v. Money*; so against the king's messenger for imprisonment of an attorney, 1000*l.* for six days, 2 *Wils.* 244. *Beardmore v. Carrington*; so in an assault about the property of a turtle, 200*l.*; for a malicious prosecution of a baronet, 10,000*l.* 2 *Black. Rep.* 1327. The court refused a new trial.

Seldom granted, unless, &c.

It is seldom granted but upon payment of costs, unless the judge specially, at *nisi prius*, order it to be moved for; but it is discretionary in the court.

There may be a case in torts to grant a new trial.

Cur. We desire to be understood, that this court does not say, or lay down any rule, that there can never happen a case of such excessive damages in torts, where the court may not grant a new trial; but in that case, the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against. *Beardmore v. Carrington.* 2 *Wils.* 250. *Sharpe v. Brice.* 2 *Black.* 942. *S. C.*

Variance.

Variance between the issue book and record of *nisi prius*, after a defence made at the trial, court refused a new trial. *Mather v. Brinker.* 2 *Wils.* 243. *Str.* 1131. Vide *Barnes* 464. *Fitch v. Nunn.*

Discovery of new evidence.

Discovery of new evidence by the attorney of an executor, defendant (then absent from *England*), though in the actual custody of the attorney himself, yet not known to him so to be, is a ground for a new trial. *Broadhead v. Marshall.* 2 *Black. Rep.* 955.

Contrary verdicts.

Where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not

not intitled by any rule or practice to a third trial.

Parker v. Ansell. 2 Black. Rep. 963.

It is a rule to shew cause; notice of such motion How to proceed, need not be given.

The rule is, *why the verdict found for the plaintiff* Rule.
should not be set aside; and in the mean time, and until this court shall otherwise order, let the entry of final judgment on the said verdict be staid.

Give your former brief to your serjeant to move, with an affidavit of the facts, and such other observations as are necessary, as the evidence on both sides; see discretionary; in the evening draw up rule at secondaries, serve copy, and shew the original; speak to the clerk of the judge who tried the cause, for his report, who will (if of another court) send it to the puisne judge; if of the same court, he will, on its being called on for argument, report it to the court; and if he declares himself satisfied with the verdict, it hath been usual not to grant it on account of its being a verdict against evidence, *Barn. 439. 2 Mod. 199.*: on the other hand, if he declares himself dissatisfied with the verdict, it is pretty much of course to grant it.

The judge should have a copy of the rule.

His lordship's book should be at *Westminster*; therefore speak to his cryer over-night, and also to Mr. Edgell, to take down the record; his fee *6s. 8d.*

The certificate of the judge reporting the matter of fact, as appearing before him at the trial, is conclusive, *Rep. temp. Hard. 23. Rex v. Poole.* Certificate of the judge.

If the verdict is set aside, and a new trial granted, draw up rule at secondaries, and serve it; and if it be *on payment of costs*, an appointment must be taken from one of the prothonotaries on the rule; serve copy, attend the taxation of the costs; when taxed, *they must be paid*, as the rule is conditional. And note, the *nisi prius* record need not be ingrossed anew, if the *postea* be not indorsed thereon; if it is, there must be a new record ingrossed: but the *jurata* must be altered as to the return; and if the cause is not tried the same term, then it must

How to proceed if the verdict be set aside.

be resealed, and paid for anew to the clerk of the treasury: and you must have a new *venire*, and *habeas corpora*, if not tried the same term; *aliter*, not. Add a new placita to the record of the term in which the cause is to be tried anew.

As to costs of
new trial.

Where a cause having been once tried, and a new trial is granted, but a juror withdrawn on the party who gained the verdict on the first trial, undertaking generally *to pay the other his costs*, such an undertaking includes only the costs of the *second trial*. *Rouse v. Bardin & al.* 1 H. Black. Rep. 639. This was determined on the terms of the undertaking only. But where the same party who gains the *first* verdict, has also the *second*, the prothonotary allows the costs of *both* trials; but where the first verdict is for one party, and the second for the other, there the costs of the former trial are not allowed. *ibid.*

The K. B. say, where nothing hath been said in the rule concerning the costs of the *first* trial, though the same party succeed in the *second*, he shall not have costs. *Mason v. Skurray.* Doug. 437. 3 Term Rep. 507. *Hankey v. Smith.*

Not
London
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ame for

Of Docketing and Carrying in the Rolls.

FORMERLY the rolls of *Easter* term were taken in and filed with the prothonotaries on or before the first day of *Trinity* term; those of *Trinity* term, on or before *Michaelmas* day; of *Michaelmas* term, at or before the 6th of *January*; and those of *Hilary*, four days before *Easter* day, *R. E.*

34 *Car. 2.* But now, by indulgence, those of *Michaelmas* term are taken in and docketed in *Hilary* term, those of *Hilary* in *Easter*, *Easter* in *Trinity* term, and of *Trinity* in *Michaelmas*; otherwise it must be filed with the clerk of the essoigns; pay 1s.

Take same to the prothonotaries, with the entries thereon complete, if you have signed final judgment; if not, as far as you have gone in the cause: if the entry of the issue or demurrer be paid for before, you pay nothing, if not, 8 *d. per sheet*; then the clerk will give you the docket roll to enter the causes; if the action be in trespass, the prothonotary's clerk pays for bringing in the roll 4 *d. per sheet*. The form of the docket is thus:

Not informed in debt.

London, ss. West for } Roll
Burton, } 11
Packer for Taylor, }

Says nothing in case.

Middlesex, ss. Un- }
derwood for Denn, } 115
Lee for Fenn, }

Judgment by default in case.

Middlesex, ss. Same }
for Doe, } 116
Same for Roe, }

Issue joined in case, on a plea of non assumpsit.

Middlesex. Same } Roll
for Doe, } 117
Same for Roe, }

Nul tiel record in case.

London. Same for }
Doe, } 118
Same for Roe, }

No judgment to
affect lands, un-
less docketed,

By the 4 & 5 W. & M. c. 20. s. 2. "No judgment not docketed and entered in the books shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators, in their administration of their ancestors, testators, or intestate's estates."

This does not affect any other than freehold lands.

The method of registering a judgment in *Middlesex* is in my 5 edit. p. 365.

Postea.

The verdict of the jury, whether for the plaintiff or defendant, or if the plaintiff be nonsuit, is entered on the back of the record, and is called the *postea*; and as the associate indorses the *postea* in this court, it is almost needless to insert precedents for that purpose; but just to give the young clerk a good idea of the steps taken after the trial, I have inserted a few forms.

Postea for the
plaintiff, or non
assumpsit.

Afterwards, that is to say, on the day, in the year, and at the place within mentioned, before Sir James Eyre Knight, the chief justice within written, came the within-named *C. D.* by his attorney within contained, and the within-named *E. F.* although solemnly required, came not, but made default; therefore let the jurors of that jury within mentioned be taken against him by his default: and the jurors of that jury being summoned, came, who, to say the truth of the within contents being chosen, tried, and sworn, say upon their oath, That the within-named *E. F.* did undertake and promise, in manner and form as the within-named *C. D.* hath within complained against him; and they assess the damages of the said *C. D.* by occasion of the not performing the within-mentioned promises and undertakings, over and above his costs and charges, by him about his suit in this behalf expended, to 20*l.* and for those costs and charges to 40*s.* Therefore, &c.

As before, upon their oath, say, That the within-named *E. F.* did not undertake and promise, in manner and form as the said *C. D.* hath within in pleading alledged. Therefore, &c.

For the defendant.

Afterwards, that is to say, on the day, in the year, and at the place within mentioned, came as well the within-named *E. A.* by his attorney within mentioned, as the within-named *A. C.* by his attorney within-named, before Sir *James Eyre*, Knight, the chief justice also within named, and the jurors of the jury whereof mention is within made, summoned to be upon that jury, being impanelled and drawn by ballot, according to the form of the statute, &c. and called over, come, who to speak the truth of the matters within contained, being tried and sworn, withdrew from the bar to consult of their verdict thereupon; and it was consulted and agreed amongst them to give in their verdict; and for that purpose they came back here again to the bar; whereupon the said *E.* although solemnly called, cometh not again, nor further prosecuteth his suit against the said *A.* Therefore, &c.

Upon a nonsuit.

Afterwards, on the day, in the year, and at the place within contained, the within-named *A. B.* by his attorney within-named, came before Sir *Henry Gould*, Knight, one of the justices of our Lord the King of the Bench, Sir *Richard Peryn*, Knight, one of the barons of our Lord the King of the court of Exchequer, at *Westminster*, and other their fellow justices of our said Lord the King, assigned to hold the assizes for the within-written county of *B.* according to the form of the statute, &c.; and the within-named *E. F.* although solemnly required, came not.—*As before.*

If the cause is tried at the assizes.

Go as far as the words “be accepted against him by his default,” *then say,* And the jurors of that jury being summoned, some of them (that is to say) *A. B. C. D.* [here name only the jurors that appeared on the panel.] And because the residue of the

If there are talesmen added,

the jurors of the same jury do not appear, therefore other persons of those standing by the court, by the sheriff of the county aforesaid, at the request of the said plaintiff, and by the command of the said chief justice (if in London or Middlesex), if at the assizes (by command of the said justices), are now newly set down, whose names are affixed in the within-written panel, according to the form of the statute in that case made and provided, which said jurors so newly set down (that is to say), K. L. of, &c. haberdasher, [naming the rest of the talesmen,] being required, came, who to declare the truth of the within contents, &c. as before.

For more precedents of this sort, see my *Instr. Cler. K. B. title Postea*, 324.

Postea may be amended.

Postea may be amended by the judge's notes, and according to the truth of the verdict. *Cooke's Rep.* 118. *Williams v. Jones*. The court ordered the *postea* to be amended in court, the defendant have four days after to move in arrest of judgment, and the plaintiff to pay costs. *Hanky v. Smith. Barnes* 494.

Of amending **Declarations,** and other **Pleadings.**

FORMERLY the suitors were much perplexed by writs of error, brought upon very slight and trivial grounds, as mis-spellings, and other mistakes of clerks, all which might be amended at the common law, whilst all the proceedings were in paper. *Vide 8 Co. 157.* For they were then considered only *in feri*, and therefore subject to the control of the courts; but when once the record was made up, it was formerly held, That by the common law, no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for, during the term, the record is in the breast of the court; but afterwards it admitted of no alteration. *Co. Lit. 260.* Now the courts are more liberal, and, where justice requires it, will allow of amendments at any time, whilst the suit is depending, notwithstanding the record be made up, and the term past; and in this court it may be done, although the roll be carried in, provided it does not too much deface it. *Term 8. Lee v. Daniel.*

Before declaration entered, the plaintiff may amend his declaration, paying costs or giving an appearance at the plaintiff's election, by the order of a judge: but after it is entered, if the amendment be but a small matter that doth not deface the roll, yet that before issue or demurrer entered, it may be amendable by rule of court upon costs, and liberty to plead, with a new or further appearance. *R. M. 1654. sect. 16.*

When a declaration may be amended.

Per Cur. The doctrine of amendment of original writs, which by *Stat. 8 H. 6.* is settled in the books. 1st, No amendment of an original writ can be made, unless for nescience or misprision of the

Originals,

Of amending Declarations,

the clerk. 2. There must be something to amend by. *King v. the Bishop of Carlisle. Barnes 9.*

After argument on demurrer, may move to amend.

After argument on demurrer, plaintiff moved to amend his declaration, which was granted; the merits of the cause not coming in question on the argument, only the form of the pleading. *Barnes 9. Farmer v. Burton.*

After an order for amendment, on payment of costs, and pleading *de novo*, defendant re-delivered the former pleas, and held good.

Defendant pleaded three pleas; plaintiff amended his declaration, paid the costs, gave a new rule to plead, and demanded a plea. Whereupon the former pleas were re-delivered, without a second application to counsel or the court; plaintiff signed judgment for want of new pleas, but it was set aside, for defendant is not obliged to vary his first defence. *Barnes 273. Wilcox v. Sharpe.*

Must pay costs after demurrer, if you wish to amend declaration.

Plaintiff obtained a rule to shew cause, why his declaration should not be amended, on giving an imparlance; and on shewing cause, it appearing that defendant had demurred, and given a rule to join in demurrer, the court held that the plaintiff must pay costs. *Barnes 6. Taylor v. Bramble.*

Avowry amended after cause entered for argument on demurrer.

Defendant moved to amend his avowry, by altering the sum due for rent, which was miscomputed. Plaintiff opposed it. Demurrer being joined, and the cause in the paper for argument *per cur.* the defendant must amend on payment of costs. *Barnes 8. Harry v. Bant.*

After argument on the merits, avowry refused to be amended.

After argument on demurrer, and rule for further argument, defendant moved to amend the avowry, by inserting three necessary requisites to justify his distress. But the amendment was denied, the former argument having been upon the merits, and there not being sufficient matter set out in the avowry to amend by. *Barnes 9. Woodman v. Inwen.*

After issue joined, defendant had leave to amend his avowry.

Defendant had avowed for a quit-rent; and issue was joined in *Easter Term*: in *Trinity* following, defendant moved for and got a rule to shew cause why he should not amend three avowries for quit-rents, payable at different times, on payment

of costs; which rule (plaintiff refusing to consent that defendant might give the matter in evidence on the present issue) was made absolute, on payment of costs; defendant *rejoining gratis*, and taking short notice of trial. *Barnes 22. Dryden v. Langley.*

After a variance pleaded between writ and count in *quare impedit*, the court gave leave to plaintiff to amend on payment of costs. *2 Wils. 118. Repington v. Guardians of Tamworth School.*

Bill against an attorney, as an attorney of *C. B.* and by mistake it was concluded, "and therefore he brings his suit," instead of, "and therefore he prays relief, &c." Upon motion in the Treasury, the judges gave leave to amend on payment of costs *nisi*, and afterwards, on affidavit of service, it was made absolute. *Barnes 3. Clerke v. Cotton, me, &c.*

Declaration in *quare impedit* amended.

Bill against an attorney amended.

Declarations in actions on bail-bonds may be amended as well as any other; the court perhaps may have refused, in some instances, to grant leave to amend writs of *scire facias*, against bail, where, by such amendment, the bail might be deprived of the advantage of surrendering the principal, as perhaps they might do in case of a faulty *scire facias* quashed, and a new one sued out. *Barnes 26. Hodgson, assignee, v. Mitchell. S. C. 114.*

Declarations on bail-bond may be amended.

On a common *clausum fregit*, plaintiff declared against defendant as administrator, and he pleaded that administration was never committed to him; upon which, defendant moved to amend his declaration, by making it stand against defendant as executor, and granted on payment of costs. *Barnes 5. Browne v. Shipman.*

On a common *clausum fregit*, declaration amended.

Of adding a new Count.

The plaintiff after plea pleaded, or after the end of the second term, shall not add a new count to his declaration (as an *indebitatus assumpsit*, or the like), under pretence of amending his declaration. *8ay. Rep. 97. 151. 172.*

Shall not, after the second term, add a new count under pretence of amending.

Settled,

May any time before the end of the second term amend, or add a new count.

Notice of decl. intitled in K. B. def. appeared and applied for an imparlance, but refused.

But must apply to add a new count within two terms.

Leave was given to add a new count after the second term, paying costs of plea and application.

The title of the declaration made agreeable to the fact.

Amendment may be applied for by summons

Settled, that the plaintiff may, at any time before the end of the second term, have leave to amend his declaration, by adding new counts, but not afterwards. *Green v. Bell. Cooke's Rep. 131.*

Plaintiff declared in this court, but by mistake he gave notice of its being filed in the K. B.: Defendant's attorney entered an appearance, and took the declaration out of the office in C. P. and then applied by summons for an imparlance. But the judges refused this in the Treasury, and held that by taking declaration out of the office, it cured the error.

The rule is, that the plaintiff must apply for leave to add a count within two terms, because he is obliged to declare within that time; otherwise he will be out of court, and a new count is the same as a declaration.

Plaintiff moved in C. B. to add a new count to his declaration, which was of *Michaelmas* term preceding, on payment of costs: defendant objected, that by the course of the court, a count could not be added after the second term, which was agreed to be the practice: but as plaintiff might discontinue, the court, to save the trouble of a new action, made the rule for the amendment absolute, on payment of the costs of the plea and replication, defendant having leave to plead *de novo*. *Barnes 19. Garway v. Stevens.*

Leave given to amend the declaration by adding pledges and memorandum, making the declaration agreeable to the bill on record. *Barnes 20. Wood v. Boon.*

The title of a declaration was amended by making it of a particular day, *viz.* the return day of the *pluries distringas*, which was sued out to compel an appearance, and to which the defendant appeared, to let in the defendant to plead a dilatory plea, *viz.* that *Wilkes* was outlawed. 2 *Wilf. 256. Wilkes v. Earl of Halifax.*

All clerical or other mistakes in a declaration of issue may be amended by summons before a judge, and

and all other proceedings, *whilst on paper*, may be both in term and also amended, by the established practice of this vacation, court.

Days of continuance, although entered on the roll, may be amended by a judge's order.

On amendment of a declaration, and a rule to plead has been given, yet the defendant is intitled to a new four-days rule to plead. 2 *Black. Rep.* 785. *Blunt v. Morris. Contra in K. B. 2 Salk.* 517. *N. on R. M. 10 Geo. 2. Reg. 2. (b).*

But after a rule granted for a new trial, there can be no amendment allowed in the record by striking out two pleas. The intent of new trials is to submit the same questions to the consideration of another jury. *Parker v. Ansell. 2 Black. Rep.* 920.

A *ca. fa.* may be amended after it has been executed, it being returnable before us at *Westminster*, and not before our justices. 2 *Black.* 836. *Hunt v. Kendrick.* But it was amended by the award on the roll. A *ca. fa.* was ordered to be amended, by making the defendant's name *Edmund* instead of *Edward*, after it was executed. *Browne v. Hammond. Barnes* 10.

The court will amend the irregular teste to a writ, when not made fifteen days before the return, it being the fault of their own officer. 2 *Black. Rep.* 918. *Carty v. Ashley.* When a plaintiff speaks a writ returnable such a day, he impliedly orders the officer to make the teste regular; and by those implied instructions we may now amend. *Ibid.*

The venue laid in *London*; verdict for plaintiff. The 1st of *February*, *fi. fa.* in *Middlesex* instead of *London* for debt and costs taxed. The *fi. fa.* was revived. Motion to set it aside, and the goods restored. On notice of this motion the plaintiff's attorney sued out a *fi. fa.* into *London*, got a return of *nulla bona*, and entered on the roll, and 5th of *February* obtained a rule to amend the *fi. fa.* by adding the *testatum* clause. The *fi. fa.* in *London* was returnable

On amendment, defendant is intitled to a new four-day rule.

After a new trial granted, no amendment allowed in the record.

Ca. fa. may after executed, be amended.

Will amend the irregular teste to a writ of *capias*.

Fi. fa. sued out in *Middlesex* instead of a *testatum*, the venue being in *London*, a *fi. fa.* was afterwards sued out and returned, court ordered it to be amended.

returnable in fifteen days of *Saint Hilary*, January 27th, five days before that on which judgment was signed, viz. February 1st. Court said, that as judgments relate to the first day of term, (except in cases of *bona fide* purchasers for a valuable consideration,) it was proper to make the rule for amendment absolute. *Meyer v. Ring*. 1 H. Black. Rep. 541.

Formedon.

The demandant had leave to amend all his proceedings in *formedon*, on paying costs of an ejectment. *Scott v. Perry*. 3 Wilf. 206. But this was by consent.

A plea in abatement not amendable.

Pleas in abatement are not amendable, because they are dilatory, and do not go to the right of the action. *Dockary v. Laurence*. *Cooke's Rep.* 29.

Bond misrecited.

In debt on a bail-bond after *comperuit ad diem*, in the issue, the bond was misrecited; court ordered it to be made agreeable to the bond on payment of costs. *Walpole v. Robinson*. *Cooke's Rep.* 26.

Issue.

An issue on *nul tiel record*, was amended by the *scire facias*. *Hamson v. Chamberlaine*. *Cooke's Rep.* 76. *Barnes* 3. S. C.

Bail piece.

Bail piece ordered to be amended agreeable to the writ, by inserting the true return. *Welland v. Pitts*. *Barnes* 4.

The real sum inserted in a plea by an executor.

Where in a plea by an executor of a former judgment recovered by mistake, a less sum is stated than the judgment was really for, if it clearly appear, that a greater sum was in truth recovered, court will give leave to amend the record, by the defendant's inserting the real sum in the plea, and the plaintiff's replying *per fraudem*; though the application be not made for such leave, till near three years after the record has been made up. *Skutt v. Woodward*, Ex. 1 H. Black. Rep. 238.

Declaration amended on plaintiff's motion by changing the venue from London to Middlesex, it being

Action against surveyors of *Westminster Bridge* for taking and destroying timber. By the act plaintiff was confined to bring his action within six months, and to lay it in *Middlesex*; by mistake, action was laid in *London*, and the mistake

not discovered till after plea pleaded and issue joined; and if plaintiff had begun *de novo*, he would have been too late; it was ordered to be amended on payment of costs. In an action upon a penal statute, the court probably would not interpose; but in the case of a remedial law, the amendment must be made. *Barnes* 488. *Cooke v. Shone and others*. 3 *Lev.* 347. *Bearcroft v. the hundred of Burnham*. Vide *Barnes* 19.

on a remedial law, and confined to Middlesex.

The court will not, after demurrer argued, permit the declaration to be amended in an action of covenant brought against executors in their own right, who had merely acted in the disposition of the testator's effects. *Noble v. King*. 1 *H. Black. Rep.* 37.

After demurrer argued, will not permit an amendment.

Judgment by Default and Inquiry.

Judgments either interlocutory, or final.

IF the defendant make default in *pleading, rejoining, surrebutting, or joining in demurrer*, (the time for the respective purpose being expired, rules being given, and demand made *where required*), as also in the not paying for the *issue or demurrer book* on demand, the plaintiff may sign his judgment by *nihil dicit*, which is either *interlocutory*, or *final*.

Interlocutory.

Interlocutory judgments are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. Therefore, if the action be in *case, trespass*, or the like (*and where it only sounds in damages*), the judgment is *interlocutory*, and there must be a writ of inquiry issued, (except the action be on a note or bill of exchange,) directed to the sheriff of the county where the action is laid, to inquire by a jury what damages the plaintiff hath sustained, who is to return the inquisition to the court; whereupon the plaintiff's attorney taxes his costs, and signs final judgment.—But if the plaintiff declares in debt, as on bond for a sum certain, or in any action wherein the specific thing sued for is recovered, the judgment is *absolutely complete*, which is called a *final judgment*.

Final.

When to sign judgment.

Judgment is not to be signed for want of a plea *till the afternoon of the next day*, after a demand thereof made in writing. *Buckmaster v. Troughton Cooke's Rep. 18*. This means where the demand is necessary to be given.

The standing rule.

It is the standing rule of the court, not to sign judgment till the opening of the office in the *afternoon after the rule to plead is out*. *Broome v. Woodward. Ibid. 55*.

And if signed too soon, the prothonotaries may strike same out of the book on the attorney for the plaintiff's application. *Craven v. Aslaby. Cooke's Rep. 124. Pract. Reg. 294. S. C.* If signed too soon.

A judgment was signed the morning next after the day given by a judge's order for time to plead. Court. The day given by the judge must be intended a whole day, and therefore the plaintiff could not sign judgment until the opening of the office in the afternoon of the next day after the day given by the judge was expired. *Cooke's Rep. 67. Herne v. Chapman.* When to sign on a judge's order.

If the defendant pleads before he takes the declaration out of the office, plaintiff may sign judgment; so if he pleads before he enters his appearance. If he pleads must take declaration out of the office.

On an order for time to plead till Monday, judgment cannot be signed till Tuesday in the afternoon. *Herne v. Chapman. Pract. Reg. 287.*

Order made 10th of January for a fortnight, cannot sign judgment till 25th, afternoon.

If plaintiff appears according, &c. he may sign judgment without calling for a plea, *Barn. 249.*

Summons is no stay after rule to plead is out, *Barn. 241. 252. 254. 273.*

If defendant pleads a judgment in another court, after a judge's order to plead issuably, or plead in abatement, plaintiff may sign judgment. 3 *Wils. 33. Cave v. Aaron. Barnes 263.* A sham demurrer, after a judge's order, is not an issuable plea, but a real demurrer to the merits is. 2 *Black. Rep. 923. Wright v. Russel.* Sham pleas.

If a tender be pleaded, and money not paid into court, plaintiff may sign judgment, *Barn. 252.* So if a plea be not delivered in form, and on stamp, *ibid. 239.* : for more of this, see title *Plea in Bar.*

How to sign interlocutory Judgment.

If you sign an interlocutory judgment, make an inscription of the declaration on a treble penny stamp paper, How to sign interlocutory judgment in case.

Judgment by Default

paper, and also warrants of attorney, on a piece of parchment unstamped; file them with the clerk of the warrants, No. 3. *Pump Court, Temple*; pay in *debt, trespass*, and *detinue*, 4*d.* each; in *other actions* 8*d.* each; he will mark the judgment-paper; then carry it with the draft of the declaration to the prothonotaries office, the clerk will sign judgment; pay him 2*s.* if the declaration be of the same term (and has been filed); if not, 8*d.* *per sheet* for declaration; and if judgment be not of the same term with the declaration, then pay for the entry of the declaration 8*d.* *per sheet* a-new, judgment 2*s.*

How if in debt.

If the action is in debt, then you enter an *incipitur* of the declaration on a double half-crown stamped paper, and file warrants of attorney as before; and after it is signed, you may get one of the prothonotaries to tax costs, and immediately take out execution. If the plaintiff takes a confession of the damages, the judgment is final.

The form of the warrants of attorney are already given, which will serve for these judgments. *Vide title Issue.*

Of an irregular Judgment.

If the judgment be irregular.

In case the judgment be irregular, the court will set it aside, on an affidavit stating the facts, *as the writ having issued, its return, the appearance, the time when declaration delivered, and the rule to plead given*; or if you were upon terms of accommodation, shew the *special matter*, and the advantage taken; and in this court the motion must be made *two days before* the day appointed for executing the writ of inquiry, *Grimes v. Cleaver, Barnes 255.* or it will not be granted. But if the irregularity be in the *notice subscribed* to the copy of the *process*, the motion must be made *before judgment signed. Ibid.* If in the notice of declaration, *two days before* the time appointed for the execution of the writ of inquiry. *Ibid.* and *Cooke's Rep. 145. S. C.*

Motion to set it aside must be made two days before the execution of inquiry.

If in notice of declaration, two days before inquiry.

A motion

A motion cannot be made on the last day of term to set aside an interlocutory judgment, if defendant could have applied sooner. *Cooke's Rep.* Cannot move last day of term.

130. *Southouse v. Pye.*

If the irregularity be clear, a notice of motion is not requisite; but I should not run the risque if I was not clear, as the proceedings are not by the rule *staid otherwise.* If irregularity be clear.

Regular interlocutory judgment may be set aside, so as to let in the defendant to try the merits of his case; but it must be on payment of costs, and such merits must likewise appear upon an affidavit, *Barn.* A regular interlocutory judgment may be set aside, if defendant has merits,

242. *Matthews v. Stone*; and it must be upon terms of pleading issuably, and taking short notice of trial, &c. *Ibid.* So a writ of inquiry may be set aside, and defendant let in to plead a fair plea on payment of costs; but as the rule is conditional, take care to pay them.

In this case notice of the motion in this court is requisite, and an affidavit of the service, as your Notice, notice will be "in the mean time that proceedings be staid."

Inquiry.

IF there be judgment by *default* or *confession*, and the certainty of the demand appears upon the record, the court may assess damages, without awarding a writ of inquiry, if they will. 2 *Saund.* 107. So if there be judgment for the plaintiff on demurrer. But where the demand is *not* certain upon the record, a writ of inquiry must issue, as in trespass, trespass on the case for goods sold, money lent, &c.

If the action be on a *bill of exchange* or *promissory note*, this court hath for some time back referred it to the prothonotary to ascertain the damages, and calculate interest on the bill or note without the writ of inquiry, *Rasbleigh v. Salmon.* 1 *H. Black. Rep.* 252. *Andrews v. Blake*, *ibid.* 529. *Longman v. Fenn*, *ibid.* 541. And so in the *K. B.* 4 *Term Rep.* 275. *Dougl.* 315. 3 *Term Rep.* 301. In an action in assumpsit for foreign money on a judgment in a foreign court, the *K. B.* refused to refer it to the master, 4 *Term Rep.* 493. The value of foreign money is uncertain. *Vide my Instr.* 5 edit. 400.

This is a rule to shew cause and obtained on an affidavit of the facts. The rule is, *why it should not be referred to one of the prothonotaries to ascertain the amount of the principal, interest due on the note, and also the costs of and occasioned by the application; and why the same should not be awarded to the plaintiff, under the judgment signed, as recovered against the defendant for the plaintiff's damages, and costs of the action; and why the plaintiff should not be at liberty to sign final judgment thereon for the same.*

Of Notice of Inquiry.

After judgment is signed, to proceed by executing inquiry.

When the interlocutory judgment is signed, give notice of executing the writ of inquiry, and the following will be the guide as to the time:

By rule, *M. 1654. sect. 21.* It is ordered, That notice of trials, or inquiries in London, or Middlesex (the defendant dwelling within forty miles of London) be eight days exclusive of the day wherein notice is given. Sunday is to be accounted as one, if it be not the day on which the notice is given. When eight days.

If there have been no proceedings for twelve months after judgment signed, there must be a term's notice of executing a writ of inquiry of damages; and such notice must be given before the assign day of the fifth or subsequent term; vide *R. E. 13 Geo. 2.*; unless the cause has been staid by injunction; and a judge's summons, if no order made, not to be deemed a proceeding. *Vide title Trial.* No proceedings for 12 months after notice.

That if defendant live above forty miles distant from London, notice of such trials or inquiries in London, or Middlesex, be fourteen days, exclusive of the day of notice. *R. M. 1654.* Where fourteen days.

This means where the venue is laid in London or Middlesex.

That eight days notice exclusive be given upon trial in the country, and upon writs of inquiry of damages, in writs of dower and waste, and all other inquiries of damages. *Ibid.* Eight days notice to be given in the country.

Where the plaintiff has entered an appearance for the defendant, pursuant to the statute, left a declaration for him in the office, given him proper notice thereof, and signed judgment for want of a plea, he may give notice of executing his inquiry, either by delivering such notice in writing to such defendant, or leaving the same for him at his last or most usual place of abode, which shall be a sufficient notice to such defendant. *R. M. 1 Geo. 2.* Where notice to be delivered to the defendant, or left at his last place of abode.

That in all cases where the plaintiff concludes *ad patriam*, and giveth notice of trial on the back of his pleadings, pursuant to rule, *Trin. 2 Geo. 1.*; if the defendant doth not join issue on such pleading before the rule be out, that in every such case, Where the plaintiff concludes *ad patriam*, defendant obliged to accept of notice of inquiry from the

time notice of trial was given.

after judgment obtained, the defendant's attorney shall be obliged to accept notice of executing a writ of inquiry, from the time that notice of trial was given on the back of such pleadings. *R. Hil. 6 Geo. 1.*

If defendant demur to declaration, he shall accept of notice of inquiry on the back of joinder; or where the plaintiff is obliged to demur to defendant's plea, then on back of such demurrer.

Notice to defendant when attorney is known not good, aliter if not.

That in all cases where the defendant demurs to the plaintiff's declaration, the defendant's attorney shall be obliged to accept of notice of executing the writ of inquiry on the back of such joinder in demurrer: and in case where the defendant pleads such a dilatory plea, that the plaintiff is obliged to demur to, that in such a case, the defendant's attorney shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer. *R. Tr. 10 Geo. 1.*

Held *per totam Curiam*, That notice of trial, or of executing a writ of inquiry, given to defendant when his attorney is known, is not good notice; but when his attorney is not known, then the notice may be given to the defendant himself. *Pract. Reg. 442. Barnes 300. Lee v. Bradford*; or at least left at defendant's house, and not in the office. *Pract. Reg. 126. White v. Edwards.*

Upon an issue of nul tiel record, notice may be given upon the book.

Upon an issue of nul tiel record, notice of executing a writ of inquiry of damages may be given upon the issue book, as well as upon a joinder in demurrer. *Long v. Lingwood. Pract. Reg. 443.*

Notice to be confined to two hours.

The notice of executing a writ of inquiry should be confined to two hours. *Pract. Reg. 445. Robinson v. Phillips. Barnes 296. S. C.*

Notice at 11 good.

The notice at eleven in the forenoon is good, if executed before twelve. *Last v. Denny. Barnes 302. Pract. Reg. 446. S. C.* But between eleven and two is bad. *Robinson v. Phillips. Pract. Reg. 445.*

Notice to be certain.

It should be certain as to place, as for instance, at what sign, or where the sheriff's office is kept. *Squire v. Almond. Barnes 297. Lemark v. Newman. Ibid. 299. Pract. Reg. S. C. 447*; and may

may be given to the country attorney. *Smith v. Lacock. Barnes 305.*

In a joint action, notice must be served on all the defendants, *Pract. Reg. 443. Kingdom v. Herne and Frost.*

Notice to all the defendants.

If the plaintiff means to attend by counsel, it should be so expressed in the notice, or the costs will not be allowed.

Counsel.

Take notice, that a writ of inquiry of damages in this cause will be executed on *Saturday* the 15th day of *November* instant, between the hours of ten and twelve of the clock in the forenoon of the same day, at the secondaries office, situate in *Grocer's Alley*, in the *Poultry*, *London*; at which time the plaintiff will attend by counsel on his part. Dated the 6th day of *November* 1793.

Notice of inquiry for London.

J. K. Plaintiff's Attorney.

To Mr. C. D. Attorney for the above Defendant.

If it be in *Middlesex*, and in *Term-time*, say, at the King's Arms tavern, Palace-yard, Westminster, in the county of *Middlesex*; if in vacation, at the Sheriff's office in Took's-court, Curfitor-street, Chancery-lane, in the county of *Middlesex*.

Middlesex.

If in the country, will be executed on, &c. and at the house of L. W. commonly called or known by the name or sign of the Blue Boar, in the High-street, Oxford, in the said county.

Country.

In case no attorney appear for the defendant, then you are to direct your notice to him, and leaving at his house will be sufficient.

Of Countermand and Continuance.

Where eight days notice is sufficient for executing inquiry, two days countermand will do; but if fourteen days notice be requisite, then six days notice of countermand. This doctrine is not laid down in any of the books, as I can find, but I take the practice to be as above stated.

Countermand.

A notice

Continuance.

A notice of inquiry may be continued over to another day, but not more than once in a term, *Barnes* 292. *Boyes v. Twist*; and two days notice must be given, *Barnes* 297. *Price v. Bambridge*; so upon short notice, *Pract. Reg.* 444. *Barnes* 301. *Butler v. Johnson*; short notice should be at least as much as is sufficient to countermand a notice; viz. two days. *Ibid.*

Notice of countermand.

I do hereby countermand the notice of executing the writ of inquiry of damages given you in this cause. Dated, &c. Yours, &c.

Notice of continuance.

I do hereby continue the notice of executing the writ of inquiry given you in this cause, to Wednesday the 20th day of April instant, when the same will be executed at the sheriff's office, &c. between the hours of ten and twelve of the clock in the forenoon of the same day. Dated, &c. Yours, &c.

Costs for not executing writs of inquiry.

It is ordered, That where notice is given of the execution of a writ of inquiry, and not countermanded in time, the defendant shall be intitled to costs from the plaintiff for not executing such writ, in the same manner as a defendant, by the course of the court, is now entitled to costs from a plaintiff who does not proceed to the trial of an issue joined after notice given. *R. T. 13 Geo. 2.*

Irregularity of notice cured by making a defence.

Irregularity of notice of inquiry is cured by making defence on executing the writ. *Barnes* 233. 309. 413.

The want of an inquiry is aided by the statute of jeofails. *Str.* 878.

An inquiry executed on the return day is good, if not on a Sunday. *Lord Ray.* 1449.

Evidence on note or bill.

Per Gould, Jus. Upon a judgment by default, in an action upon a promissory note, or a bill of exchange, the sum due thereon is admitted, and need not be proved upon the execution of a writ of inquiry. *Anon.* 3 *Wils.* 155. Formerly the contrary was the practice. And the jury may give interest. 2 *Str.* 1149. But defendant shall not give

give in evidence fraud, for he admits the contract as declared. 1 Str. 612.

No set-off can be admitted at the trial without plaintiff's consent.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the Sheriff of Middlesex, greeting: Whereas Richard Fenn, late of Westminster, in your county, gentleman, was attached to be in your court, before our justices at Westminster, to answer John Denn in a plea, For that whereas (to the end of the declaration) to the damage of the said John of 20l. as he saith; and it was in such manner proceeded in our said court, that the said John sought to recover against the said Richard his damages, by occasion of the premises: but because it is unknown what damages the said John hath sustained by occasion of the premises aforesaid, We command you, That by the oath of twelve good and lawful men of your county *, you diligently inquire what damages the said John hath sustained, as well by reason of the premises, as for his costs and charges by him about his suit in this behalf expended; and the inquisition which you shall thereupon take, make appear to our justices at Westminster, in fifteen days of Saint Martin, under your seal, and the seals of those by whose oath you shall take the said inquisition; and have there this writ. Witness Sir James Eyre Knight, at Westminster, the 6th day of November, in the 34th year of our reign.

Writ of inquiry.

This writ will serve for case, trespass, assault, &c.

* If in London, say bailiwick.

This writ is to be ingrossed on a 2s. 6d. stamp parchment, and signed by the prothonotaries: pay 1s. 4d. for the first count, and 8d. each other, but if long and special 8d. per sheet first count, and 4d. every other signing, seal 7d.; leave it at the sheriff's office one day before the execution; R. Hil. 23 Geo. 3. first indorsing on it the day and hour in which notice is given for its execution; pay in London 1l. 9s. 4d. if no witnesses, and 4d.

4d. for every witness; in *Middlesex*, 1l. 10s. 4d. other counties 1l. 11s. 6d.

When the day for executing your inquiry comes you attend the deputy sheriff and the jury, with evidence to prove the plaintiff's demand, or the damages sustained by him, and the defendant may produce witnesses on his part, in mitigation of such damages, for damages though ever so small must be assessed.

Of subpœnaing Witnesses.

If the witnesses will not voluntarily attend at the execution of the inquiry, the party wanting their testimony may sue out a *subpœna*, as follows and which you may have at the stationer's, read printed on a 2s. 6d. stamp.

Subpœna on inquiry.

Four may be put in one subpœna.

George the Third, &c. To John Doe, Richard Roe, Samuel Ball, and Richard Fuz, We command you, and every of you, that setting aside all singular businesses and excuses whatsoever, you, and every one of you, be and appear in your proper persons, before _____ esquire, and _____ esquire, sheriff of our county of *Middlesex*, on *Monday* the _____ day of _____ next, at the sheriff's office in *Took's-court*, *Castle-yard*, in the county of *Middlesex*; if in *London*, say (before _____ esquire, and _____ esquire, sheriffs of our city of *London*, at the secondaries office in *Grocer's Alley*, in the *Poultry*, in our said city); if in the country, say (before *A. P.* esquire, sheriff of the county of *Oxford*, at the house of *William Long*, commonly called or known by the name or sign of the *Red Lion*, in the *High-street*, in *Oxford*, in the said county, on the _____ day of _____ next, by eleven of the clock in the forenoon of the same day), there to testify the truth according to your knowledge, in a certain cause now in our court of the Bench, depending between *John Denn*, plaintiff, and *Richard Fenn*, late of, &c. defendant, of a plea of trespass on the case

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(as the nature of the action is), on the part of the plaintiff, on which our certain writ of inquiry of damages has been sent by our said justices, out of our said court of the Bench, and directed to the said sheriff, then and there in due form of law to be executed before the said sheriff. And this you, nor any of you, shall in no wise omit, under the penalty of every of you, of 100*l*. Witness Sir James Eyre Knight, at Westminster, the 6th day of November, in the 34th year of our reign.

To be signed by the prothonotaries, pay 1*s*. seal 7*d*.; each witness must be served with a copy, and paid 1*s*. No *præcipe* is requisite for the office.

N. B. There is no rule for judgment given in this court on the inquiry, but you stay the *four* days before you sign the judgment on the inquiry.

Of Arrest of Judgment.

After judgment on demurrer, defendant shall not come to arrest the judgment on inquiry, for an exception that might have been taken on arguing the demurrer. *Secus* in case of judgment by default, or if the fault arises on the writ of inquiry or verdict. *Vide Str. 425. Edwards v. Blunt.*

If upon executing a writ of inquiry the plaintiff takes damages on *all* the counts, and *one* is bad, the defendant may move in arrest of judgment.

The motion to arrest the judgment should be made on or before the appearance day of the return of inquiry, *Bar. 445.*; and if moved the last day of term, there must be notice. *Ibid. 247.* The K. B. allow the motion any time *before judgment* *signed. Dougl. 745. Vide case below.*

When Motion may be made to quash.

Writ of inquiry executed in *Hilary* vacation returnable the first return of *Easter* term, and executed before two persons, under-sheriffs extraordinary,

An inquiry taken before two under-sheriffs extra set aside.

If final judgment be not signed, may move to set aside the inquisition on the 6th day in that term.

nary, appointed by the sheriff for that purpose. The jury assessed 77*l*. Final judgment might have been signed 23d April, but not being done. Motion the 26th April, that the inquisition might be set aside; *first*, because the sheriff could not depute more than two persons to take an inquest; *secondly*, for excessive damages. In answer to this it was said, that this motion ought to have been made *within the first four days in term. Sed non allocatur, per curiam*, the defendant made the motion *before final judgment* was signed, so came soon enough. As to the other point, *Court said*, there was no instance of deputing two under-sheriffs extraordinary to take an inquest; if the sheriff may appoint two, he may appoint twenty; and it appears that the under-sheriff lives in the same town and therefore it ought to have been executed before him. Inquisition ordered to be set aside, and the writ of inquiry executed before a judge at the next assize for Suffolk. *Denny v. Trapnell, Esq. 2 Will. 378.*

It may be quashed after execution, if there was not regular notice, *Pract. Reg. 558*. So the court may set aside the inquiry for excessive damages; or if the jury find no damages, it may be quashed. *Barn. 230.*

After interlocutory judgment and awarding inquiry, the plaintiff becomes bankrupt, and afterwards in his own name the inquiry is executed, and good, without suing *sci. fa. assignees*.

Case upon promises. Plaintiff declared in *East* term, 7 *Geo. 3*. In *Trinity* term last, he obtained an interlocutory judgment. An inquiry was then awarded, returnable and executed, *M. 8 Geo.* But *after the said judgment*, and the awarding of inquiry, and *before same was executed*, plaintiff became a bankrupt. Motion to set aside the inquiry and inquisition, for there ought to have been a *facias*, by the assignees, *why they should not have writ of inquiry of damages*. On shewing cause, it was said, that defendant is a prisoner, and would be discharged if plaintiff could not be permitted to proceed to final judgment this term upon the inquiry. *Curia*. We will consider this as a writ of inquiry executed by the assignees in the name of the bankrupt.

bankrupt, and the objection coming out of the mouth of the defendant is very unfavourable; besides, the writ was awarded in *last term, before the plaintiff was a bankrupt*, and the inquisition ought in justice to be supported; otherwise the defendant would get out of gaol, and the creditors injured. *Rule disch. Bibbins et al. versus Mantel. 2 Wils. 358. M. 8 Geo. 3.*

In covenant, on a deed of assignment by the defendant of particular debts, and he covenants that none of those deeds were satisfied: judgment by default, and a writ of inquiry executed. A fatal mistake was found in the declaration: on which it was moved, that the interlocutory judgment might be forthwith entered upon record, agreeable to the declaration delivered, and the roll be brought into the proper office; and that the defendant might have *four days* to move in arrest of judgment after the roll brought in. On shewing cause, it appeared that defendant attended the execution of inquiry by counsel, and cross-examined the plaintiff's witnesses. *Per cur.* We lament, that entries on the roll are not made at the times when they ought to be made: the rule must not be discharged, because defendant did not rely on the mistake, but has made a defence on the executing the writ of inquiry. *Freeland v. Hunt. 2 Wils. 380.*

Rule to shew cause, why inquiry and inquisition should not be set aside for two objections: 1. That the notice was served on defendant himself, and not the attorney. 2. That the time appointed by the notice for executing inquiry was between the hours of ten and five. It was admitted that both objections were good; but it was insisted that both were cured by an attorney attending on the part of defendant, and cross-examining witnesses, and producing a witness on part of defendant. Court ordered inquiry to be set aside for excessive damages only, and a new writ to be executed before a judge. *Barnes 233.*

After defence made on inquiry, the defendant not allowed to take advantage of a mistake in the declaration.

Court will not set aside an inquiry, if an attorney attend on the part of the defendant.

Of final Judgment.

Judgment cannot be signed till four days after the return day, *inclusive of both days.*

Inquisitions to be left in the office on signing judgment.

When final judgments shall be signed on *posse* or on inquisitions upon writs of inquiry, such *posse* or inquisitions shall be left with the clerk of the judgments, and shall not be afterwards taken out of the office without leave of the court. *R. T. 13 Geo. 2. R. Trin. 29 Car. 2. Reg. 5.*

When inquiry is returnable, how to proceed.

After the return of the inquiry, apply to the sheriff for the same; then take it to the stamp office and get the inquisition stamped with a double half-crown; when the four days are expired, go to the prothonotaries, and get the clerk to enter the inquisition, pay 7s. 4d. in case, in trespass 6s. 8d. more; then go to one of the prothonotaries, and he will tax the costs, and deliver over the inquisition to the clerk of the judgments, who will enter up final judgment, *R. T. 13 Geo. 2.*; but as soon as the costs are taxed, you may take out execution, or arrest defendant for the damages, and costs included.—*N. B.* The defendant's attorney may have a rule to be present, if he thinks fit, upon applying to the secondary's office; pay 4s. 6d. and then plaintiff's attorney is bound to give notice of taxing costs.

Prothonotary 3s. 4d. Clerk of the judgments 2s.

If term begins on *Wednesday*, you may sign judgment on *Saturday* evening in strict practice.

Of confessing the Action.

In order to prevent the execution of a writ of inquiry, frequently the defendant (to save the costs) confesses the action, or the attorney does it for him, with a stay of execution, which confession is generally wrote in the margin of the declaration or it may be done on the back of the inquiry, or on plain paper, thus: "*I confess this action; and that the plaintiff hath sustained damages to the amount of 20l. besides his costs and charges (to be taxed by the court)*"

Take it in double the debt due.

of the prothonotaries); and no judgment shall be entered up, or execution issue, until the day of next, in default of payment of the sum of 10l. being the debt in this action, together with the said costs. And that no writ of error shall be brought, nor any bill in equity filed. And that in case the plaintiff shall enter up his judgment in default of payment, he shall be at liberty to levy the said 10l. together with the costs taxed, and also sheriff's poundage, and all other incidental charges. As witnesses," &c.

If the confession be in an action of debt, then it may be, "I hereby confess the debt in this cause, and that the plaintiff hath sustained damages to the amount of 1s. besides his costs and charges to be taxed by one of the prothonotaries, and the debt is agreed to be paid as follows," &c. (here insert the days of payment), and then as above. Cognovit in debt.

If the judgment is to be forthwith entered up, then sign it upon a double 2s. 6d. stamped paper, with the prothonotaries, first making an incipitur of the declaration thereon, and filing warrants of attorney. How to sign the judgment.

If your roll is already taken in, there needs no payment a-new, but for signing the judgment, nor no new roll; pay 7s. 4d. tax the costs, and take out execution.

It is very common after plea pleaded, to confess the action; or after issue delivered; in such case, you put in the confession. "I hereby consent to withdraw the plea pleaded in this cause, and confess the action, and that the plaintiff hath sustained damages to the amount of 20l. besides his costs," &c. as above, so that a retraxit may be entered on the roll. This is done by taking the judgment paper to Mr. Sherwood at the prothonotaries, who signs the judgment, and marks the retraxit thereon; pay 2s. retraxit, and for signing judgment as before.—N. B. In this case the attorney for the defendant need not be present, as in the

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King's

King's Bench; file warrants of attorney, if not before done.

Of executing a Writ of Inquiry before the Chief Justice or Judge of Assize.

There are cases in which the court will grant a rule to execute before a judge.

There are cases upon which application may be made to the court to have the writ of inquiry executed before the chief justice, at the sittings in London or Middlesex, or before the justices of assize: but leave is seldom granted, unless the case is very special; as where the law is mixed with the fact, or it appears to be of too much consequence for the sheriff to undertake, in which case the jury set their hands and seals to their verdict; and upon the trial, the judge of *nisi prius* is said to be only an *assistant* to the sheriff, and has no judicial power; and if the parties come to an agreement at the trial, the judge is to sign it, and afterwards the court may be moved to have it made a rule of court. 12 Mod. 519. 610. Barnes 135. Waite v. Smales.

How to apply.

The way to apply is, to make affidavit setting forth the circumstances of the parties, plaintiff and defendant, and the nature of the action, upon which the court will grant a rule to shew cause; and if made absolute, you may at same time move for sheriff to return a good jury.

Notice.

The notice of inquiry before the chief justice or judge of assize, ought to be for the sittings or assize generally, and not for any particular day, Barnes 135. Waite v. Smales; and notice for a particular day is void. *Ibid.* It is said, the writ need not be entered with the marshal, not being within the rule concerning records of *nisi prius*; but the practice now is to enter it with the marshal, and to pay 13s. 9d. as also the court fees.

In this court a common writ of inquiry is made out, and certainly is right; but

If the rule is made absolute, a common writ of inquiry, directed to the sheriff, is made out by the plaintiff's attorney, and the sheriff brings the writ into court, calls and swears the jury, &c.; and he also

also returns the inquisition as taken before him in the presence of the chief justice; and at the usual time call on the sheriff for the return of the inquisition, and tax the costs.

N. B. I saw one very lately in this court; but the inquisition was not returned under the hand and seal of the jurors, but in common form. The sheriff's fee is as usual.

in King's Bench the practice seems to be otherwise; but no entry of a special writ of inquiry is to be found in the books.

In the Common Pleas.

John Denn, Plaintiff,
and
Richard Fenn, Defendant.

John Denn, of, &c. the plaintiff in the above cause, maketh oath and saith, That he this deponent was very early on *Sunday* morning of the 5th day of *January* last, wrongfully arrested and took into custody by *Richard Fenn*, the above-named-defendant; and was by the said defendant, and his assistants, inhumanly beat and otherwise ill-treated, and had his cloaths very much torn by defendant, and his assistants, by dragging him through the streets, and was taken to and detained in defendant's house for a long time, and was there threatened to be put in irons by defendant and his wife: and this deponent saith, That after being so ill-treated and detained for a long time, he was told by defendant, that he might go about his business, for that he was not the man defendant wanted: and this deponent saith, That he told said defendant immediately, upon his being first accosted by him, that his name was *John Denn*, and did every thing in his power to convince said defendant that he was not the man against whom the defendant had a warrant, namely, one *R. F.* but to no purpose: and this deponent saith, That an action was commenced, and is still depending against the said defendant for the before-mentioned trespass, assault, and false imprisonment; and that the said defendant hath suffered judgment to be entered against him

Affidavit in order to move the court.

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By

by default, in the said cause: and this deponent further saith, That he is fearful if a writ of inquiry of damages in the above cause should be executed before the sheriff of *Middlesex*, that he this deponent shall not have an impartial assessment of damages, as the said defendant hath long been an officer to the said sheriff of *Middlesex*; and as this deponent is informed, and verily believes, is well acquainted with the set of men who generally attend as jurymen to assess the damages upon writs of inquiry before the said sheriff: and therefore this deponent saith, That for the sake of a fair and impartial assessment of damages, in the above cause, he wishes for leave to execute his said writ of inquiry before the chief justice of this honourable court.

Rule to shew
cause.

Denn v. Fenn Tuesday the day
of . Upon reading the affidavit of the plaintiff, *It is ordered*, That the defendant, upon notice of this rule to be given to his attorney or agent, shall shew cause to this court to-morrow peremptorily, before the rising of the court (otherwise this rule shall be then absolute), why the writ of inquiry of damages in this cause, should not be executed before the sheriff of the county of *Middlesex*, at the sitting of *nisi prius* to be held for that county, after this present term, in the presence of the lord chief justice, or one other of the justices of this court, by a good jury to be impanelled, returned, and sworn by the said sheriff; pay 7s.

Affidavit of ser-
vice of the rule.

J. M. clerk to C. G. of, &c. gentleman, maketh oath and saith, That he this deponent did, about four of the clock of the day of the date hereof, leave a true copy of the rule hereto annexed, at the office of Mr. H. who acts as attorney or agent for the above-named defendant, with the clerk of the said Mr. H., at, &c. and did also at the same time leave therewith an examined copy of the affidavit made
by

Inquirp before Chief Justice.

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by the above plaintiff, on his obtaining the said rule; dated the day of 1793: and this deponent faith, That at the time of the service of such rule, he this deponent shewed unto the said clerk of the said Mr. H. the said original rule hereunto annexed.

Take notice, That a writ of inquiry of damages in this cause will be executed at the sittings after this present *Easter* term, to be held at *Westminster-hall*, in the county of *Middlesex*. Dated, &c. yours, &c. *Barnes* 135. Notice of inquiry.

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Judgment on Warrant of Attorney.

Of entering up Judgment on a Warrant of Attorney.

IT happens frequently, that after the defendant is arrested and proceeded against, the plaintiff, in order to prevent expence, accepts a warrant of attorney for his demand, with a defeazance, payable by instalments; if it does so happen, and the defendant is in custody, the following rules must be observed.

If the defendant gives a warrant of attorney to confess the action, the judgment will be good, though he die the same day judgment be signed. *R. Ray. 18.*

The warrant must be strictly pursued; and therefore if it is to confess in *Trinity* term without more, it cannot be done in any other term, *1 Mod. 1.* If defendant die in term, it may be entered after his death the same term. So in vacation, for the judgment will have reference to the preceding term, *Barn. 270.*

But if plaintiff die, and the warrant does not empower him, his *executors* or *administrators*, to enter up the judgment, it cannot be entered, *vide Str. 718.*; otherwise the executor may, *ibid.*

How warrants of attorney to acknowledge judgment, must be taken of prisoners.

That no bailiff or sheriff's officer shall presume to exact or take from any person, being in his custody by arrest, any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant; which attorney shall then subscribe his name thereunto; which said warrant shall be produced when the said judgment shall be acknowledged; and if any bailiff or sheriff's officer shall hereafter offend or do contrariwise, he shall be severely punished for so doing. *R. H. 14 & 15 Car. 2.* Attorney's clerk not sufficient. *Barn. 42.*

That no attorney shall from henceforth acknowledge, or enter, or cause to be acknowledged or entered, any judgment by colour of any warrant gotten from any defendant being under arrest, otherwise than is as aforesaid. *Ibid.*

No attorney shall enter any judgment gotten from any defendant than as aforesaid.

To prevent frauds and impositions in the execution of warrants of attorney for confessing of judgments in this court, *It is ordered*, That every such warrant of attorney shall be *read over* by the person who is to execute the same, or by some other person to him, before the execution thereof; and that if judgment shall be entered up, upon any such warrant of attorney, and which shall not be so *read over* as aforesaid, such judgment, upon motion, may be set aside as irregular. *R. T. 14 & 15 Geo. 2.*

Warrants of attorney for confessing judgment to be read to the party.

Warrant of attorney taken by plaintiff to confess judgment to himself, held not good, the defendant being in custody, and no other attorney present, and set aside, and restitution ordered. *Carter one, &c. v. Smith. Cro. Rep. 128.*

But if the defendant himself be an attorney, or practises as such, it is sufficient, though no attorney on his behalf be present. *Barnes 37. Walton v. Stanton. Cooke's Rep. 94. S. C.*

If defendant be attorney.

It is not necessary that a warrant of attorney to confess a judgment in this court, given by a person in custody, be executed in the presence of an attorney of this court; if it be in the presence of an attorney of the *King's Bench*, it is sufficient. *Barn. 44. Vilmot v. Barry.*

In presence of an attorney of King's Bench sufficient.

November 16th, 1750. Declared by all the judges in the treasury chamber, that if a warrant of attorney to enter judgment be above a year old, and under ten years old, leave to enter judgment may be given by a treasury rule; but if the warrant be above ten years old, the court must be moved for leave to enter judgment. If the warrant of attorney be under twenty years old, the common affidavit of the due execution of the warrant, *that the debt is unpaid, and the parties living*, is sufficient for an absolute rule; but if the above warrant be

A judgment may be entered on an old warrant of attorney under ten years old.

If above ten years.

If under twenty years.

above twenty years old, the rule must be to shew cause, and served on defendant. *Barne* 47. *Cooke's Rep.* 146. *Roundell v. Powell.*

Judgment entered on an old warrant of attorney on affidavit of defendant's being alive in Jamaica four months before.

Motion for leave to enter judgment on a warrant of attorney after a year. It was sworn that defendant was living in Jamaica, and in good health, and had been conversed with by the deponent the 13th of September last, and that the deponent sailed from thence the 17th of last month, and arrived in London the 15th of January following. Leave granted, plaintiff having applied as soon as he well could. *Barnes* 256. *Roundell v. Powell, Cooke's Rep.* 146. S. C.

Must be sworn to be alive within fortnight.

By the practice of this court it must appear by the affidavit, that the party was alive within a fortnight of making the application. *Per Heath, J. Trin.* 33 *Geo.* 3.

Plaintiff a lunatic, affidavit of the person who received the interest sufficient.

On motion to enter up judgment on an old warrant of attorney, plaintiff being a lunatic, did not swear the money unpaid; but another did, who had received the interest upon the bond for three years, ever since the plaintiff was lunatic. *Cur.* Let judgment be entered up. *Barnes* 42. *Coppendale v. Sunderland.*

Motion to enter up judgment, the warrant not expressing any term.

Motion in treasury for leave to enter judgment on an old warrant of attorney, not expressing any term or time, and granted, no cause being shewn to the contrary. *Barnes* 52. *Mould v. Jackman.*

If defendant die, and the judgment entered on the next day, as it did not appear to the court that he was dead at the time; leave was given to enter it up, and it will not be set aside.

Defendant died 20 April; 21 application was made on affidavit from *Essex*, sworn the 19th of April, for leave to enter up judgment on an old warrant of attorney. Rule made and judgment signed 21 April. Motion by executors of defendant to set aside the judgment; defendant being dead before rule made and judgment signed. Rule to shew cause. If it had appeared to the court that defendant was dead, leave had not been given to enter judgment, but *quod fieri non debuit factum valet*. Here is no imposition on the court; the judgment when signed relates to the *essoign day* of the present or preceding term. The court will

adhere to fictions and relations when they tend to promote justice. *Savile v. Wiltshire. Barnes*

270.

Defendant gave a warrant of attorney to enter judgment at the suit of plaintiff, *John Still* and *Susannah Still* deceased. The judges in the treasury gave leave to enter judgment at the surviving plaintiff's suit, upon his affidavit of the due execution of the warrant of attorney, and that the debt was unpaid, and the defendant alive. *Barnes* 40. *Still v. Still. Ibid.* 53. *Gladwin v. Scott.*

Leave to enter up judgment at the suit of an executor on an old warrant of attorney; the words whereof extended to enter judgment at the suit of testator, his heirs, executors, or administrators. *Barnes* 44. *Coles v. Haden*; but not if these words are left out.

Leave granted to enter judgment on an old warrant of attorney in *Michaelmas* term, on affidavit of the due execution of the warrant and debt unpaid, and affidavit that defendant was living in *Ireland* on the 18th of *September* preceding, as a reasonable length of time for distance. *Barnes* 54. *Horsley v. Scuter.*

If the warrant of attorney is given to a feme sole, and she marries before judgment is entered up, application must be made for leave to enter it up by the husband and wife, founded upon an affidavit proving their marriage. *Vide 3 Bur.* 1471.

Where a warrant of attorney to enter judgment was given to a feme sole, and she having married before the judgment entered, the court gave leave to enter judgment at the husband and wife. Cited in the case of *Coles v. Haden, Barnes* 45.

It appeared that defendant died before the judgment signed, but after the first day of term in which it was signed; the judgment was held good, because all judgments are such from the first day of the term in which they are signed. *Rogers v. Bretton, Cooke's Rep.* 11.

Warrant to enter judgment at the suit of two, motion to enter judgment at the suit of the survivor.

Leave given to enter at the suit of an executor on warrant.

Living in *Ireland* 18th of *September*, leave granted in *M. T.*

How to enter it up, if given to a feme sole, who afterwards marries.

Warrant given to feme sole, she married, entered at the suit of her and husband.

Judgment signed after defendant's death, held good.

In

On a post obit bond and warrant, leave will not be given to enter up judgment after a year and day, without a rule to shew cause, it being a security of a doubtful nature.

In the year 1780 bond given for 1800*l.* to the plaintiff, conditioned for the payment of 900*l.* (in consideration of 400*l.* advanced at time of the execution) on the death of the defendant's father, in case the defendant should survive, with a warrant of attorney. The father died September 1788, and the son still living. Motion to enter up judgment on the warrant of attorney on the statement of these facts. The Court said, as this was a *post obit* bond, a security of a questionable nature, which had often been disputed with success, leave ought not to be granted without a rule to shew cause. If judgment is entered immediately on giving the warrant, or within a year and a day after, transactions of this sort may probably be brought to the knowledge of the family of the obligor, and a guard raised against fraud and imposition. But if the obligee waits till the death of the father or relation, the court will prevent his having immediate execution, by which he might force the obligor to submit to such terms as he should think proper to impose, and will again require him to give due notice of his intention. On hearing this Adair took nothing by his motion. *Lushington v. Waller.* 1 *H. Black. Rep.* 94.

How to apply to enter it up.

The first thing to be done is, to make the following affidavit :

In the Common Pleas.

John Denn, Plaintiff,
and
Richard Fenn, Defendant.

Affidavit of debt due on warrant of attorney, only being given as a security.

John Denn, of *Fleet-street*, London, hofier, the above-named plaintiff, and *Richard Budd*, of the same place, yeoman, severally maketh oath and say : and first this deponent *John Denn* for himself faith, That the above-named defendant *Richard Fenn* being justly indebted unto this deponent, in the

the sum of twenty pounds, for goods sold and delivered, and work done (here set forth the consideration), did, in order to secure unto him this deponent the same, execute unto this deponent the warrant of attorney hereto annexed: and this deponent further saith, That the whole of the said twenty pounds is now justly due and owing unto him this deponent, and that he verily believes the said *Richard Fenn* is now living, he this deponent having seen and conversed with him two days since: and this deponent *Richard Budd* for himself saith, That he was present, and did see the said warrant of attorney executed by the said defendant, and that the name *Richard Fenn*, set and subscribed at the foot thereof, is of the proper hand-writing of the said *Richard Fenn*, and that he did sign, seal, and as his act and deed deliver the same, in the presence of this deponent; and that the name *R. Budd* set and subscribed as the witness to the said warrant of attorney, is of the proper hand-writing of this deponent.

Before the judges go into court, speak to one of the secondaries, who will take you into the treasury-chamber, where you will move upon this affidavit to leave to enter up the judgment, which will be granted of course; in the evening draw up the rule at the secondaries; pay 5s. and sign judgment.

How to apply in term time.

If in vacation, take the affidavit to a judge, who will grant an order for that purpose, pay 4s.; prepare on a slip of parchment warrants of attorney for the plaintiff and defendant thus, mentioning the term.

In vacation.

Middlesex, to wit, *John Denn* puts in his place *J. U.* his attorney, against *Richard Fenn*, late of *Westminster*, in the said county, hosier, in a plea of debt.

Warrant for the plaintiff.

Middlesex, (ss.) The said *Richard Fenn* puts in his place *J. B.* his attorney, at the suit of the said *John Denn*, in the plea aforesaid.

For defendant.

Then

How to sign
judgment.

Then prepare the judgment, which is done by entering an *incipitur* of the declaration on a double 2 s. 6 d. stamped paper ; take same with a memorandum on a 2 s. 6 d. stamp, and warrants of attorney to the clerk of the warrants, who will sign the judgment paper (annex the rule thereto), pay 8 d. go to the prothonotaries office, and the clerk will sign the judgment, and tax the costs ; pay signing 5 s. 4 d. ; after this take out execution. No appearance is entered with the filacer, you leave the memorandum with the prothonotaries clerk.

In the court of Common Pleas.

Warrant or memorandum.

Middlesex, (ff.) *A. B.* is retained to enter up judgment on a *cognovit actionem* (or warrant of attorney to acknowledge judgment, *as the case may require*), dated on the day of at the suit of *C. D.* against *E. F.*

A. B. Attorney (if by agent add) by *G. H.* his Agent.

Entered (or filed of record, *as the case may require*) this day of , in the 34th year of the reign of

(*Officer's name.*)

If the defendant has given a bond with the warrant of attorney, you declare on the bond ; but if there be a warrant of attorney only, then you declare on the warrant of attorney, as thus :

Declaration on warrant of attorney and judgment by nildicit, as entered on the roll.

The date of the warrant.

Middlesex, (ff.) *Richard Fenn*, late of *Westminster*, in the said county, hosier, was summoned to answer *John Denn* in a plea, That he render to the said *John* forty pounds of lawful money of *Great Britain*, which he owes to, and unjustly detains from him ; and thereupon the said *John*, by *S. U.* his attorney, complains, That whereas the said *Richard*, on the day of the year of our Lord 1793, to wit, at *Westminster* in the said county, borrowed of the said *John* the said forty pounds above demanded, to be paid

the said *John* when he the said *Richard* should be thereto afterwards requested; yet the said *Richard* (although often requested, &c.) hath not yet paid the said forty pounds above demanded, or any part thereof, to the said *John*, but he to pay the same, or any part thereof, to the said *John*, hath hitherto wholly refused, and still refuses; wherefore the said *John* saith he is injured, and hath sustained damage to the value of ten pounds, and therefore he brings his suit, &c.

And the said *Richard* by *Joseph Bruce*, his attorney, comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John*, by which the said *John* remains therein undefended against the said *Richard*: *Therefore it is considered*, That the said *John* recover against the said *Richard* his said debt, and also 63s. for his damages which he hath sustained, as well by occasion of the detaining the said debt, as for costs and charges by him about his suit in this behalf expended, by the court here adjudged to the said *John* by his assent; and the said *Richard*, in mercy, &c.

Judgment by nil
dicit thereon.

Judgment signed
the 10th No-
vember 1793-

Mercy.

To the end of declaration: and the said *Richard*, by *Joseph Bruce* his attorney, comes and defends the wrong and injury, when, &c.; and the same attorney of the said *Richard* says, That he is not informed by the said *Richard* of any answer to be given for the said *Richard* to the said *John* in the premises, nor doth he say any thing in bar or preclusion of the said action of the said *John*, by which the said *John* remains therein undefended against the said *Richard*: *Therefore it is considered*, That the said *John* recover against the said *Richard* his said debt, and also 63s. for his damages which he hath sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in this behalf expended by the court here adjudged to the said *John* by his assent; and the said *Richard*, in mercy, &c.

If by non sum
informatus on
same.

Judgment
signed, &c.

But

Warrant of Attorney.

But if the defendant gives a bond with a warrant of attorney, then your affidavit will vary, as thus :

In the Common Pleas.

J. G. Plaintiff,
and
C. D. Defendant.

Affidavit of money being due on bond, and of the execution of warrant of attorney.

J. G. of, &c. the above-named plaintiff, and J. P. of, &c. gentleman, severally make oath and say, and first this deponent J. G. for himself saith, That the above defendant is and stands justly indebted unto him this deponent, in the sum of 200*l.* upon and by virtue of a certain bond or obligation, bearing date the 21st day of January last past, entered into by the said defendant to this deponent in the penal sum of 400*l.* conditioned for making void the same on payment of the sum of 200*l.* and interest for the same, after the rate of 5*l.* per cent. per annum, on the 6th day of July following, and also the sum of for interest thereof; And for the better securing to this deponent the payment thereof, the said C. D. did, on the same day and year, enter into and duly execute the warrant of attorney hereto annexed: and this deponent further saith, That he verily believes the said defendant is now living, he this deponent having seen and conversed with him two days since: and this deponent J. P. for himself saith, That he was present, and did see the warrant of attorney hereto annexed, duly executed by the said defendant, and that the name C. D. set and subscribed at the foot thereof, is of the proper hand-writing of the said defendant C. D. and that he did sign, seal, and as his act and deed deliver the same, in the presence of this deponent; and that the name J. P. set and subscribed as the witness thereto, is of the proper hand-writing of this deponent.

Warrants of attorney obtained by fraud.

Courts of justice have a power or controul over a warrant of attorney, and therefore they can order them

them to be delivered up, if obtained by fraud, before any use has been made of them ; and they have the same jurisdiction as well previous as after the judgment is entered : if it were otherwise, a judgment might be entered up in vacation, and the party taken in execution before any application would be made to the court for relief. *Vide Dougl.* 196.

If warrant of attorney be given on an usurious *Usury,* contract and entered up, the court will on motion to set it aside direct an issue to try the facts. *Barn.* 277.

Judgments.

Vide p. 74.

THE clerk of the judgments is the proper officer to draw and enter up all *final judgments after inquisitions taken, verdicts* obtained, or *nonfuits* and on *demurrers* and issues joined upon *mutuel record*, as also all continuances necessary in the aforesaid judgments. Therefore if they are required to be entered up, speak to Mr. *Lickbarrow* for that purpose.

The prothon.
provides the roll.

N. B. The prothonotary, at the time of signing the judgment, provides the roll for the entry, which is to be wrote in a fair hand, leaving the margin of an inch wide, and proper room at the top for the prefs, which is marked with the prothonotarie names; then first enter the declaration thus:

Entry of an in-
terlocutory judg-
ment.

Middlesex, (H.) Richard Roe, late of *Westminster* in the said county, yeoman, was attached to answer *John Doe*, in a plea of trespass on the case and whereupon the said *John*, by *S. U.* his attorney complains, *For that whereas* (to the end of the declaration), suit, &c.

If defendant ap-
pears, put the
attorney's name.

And the said *Richard*, in his proper person comes and defends the wrong and injury when &c. and says nothing in bar or preclusion of the said action of the said *John*, by which the said *John* remains therein undefended against the said *Richard* for which the said *John* ought to recover against the said *Richard* his damages by occasion of the premises*. But because it is unknown what damages the said *John* hath sustained by occasion thereof Therefore it is commanded to the sheriff, that by the oath of twelve good and lawful men of the said county, he diligently inquire what damages the said *John* hath sustained, as well by occasion of the premises, as for his costs and charges by him about his suit in this behalf expended; and that the inquisition which he shall thereupon take. he make appear to the justices of our Lord the King at *Westminster*

* This word
may be used in
all actions,
which saves ano-
ther precedent.

minister, in three weeks of the *Holy Trinity*, under his seal, and the seals of those by whose oath he shall make the said inquisition, together with the writ of our said Lord the King to him thereupon directed. At which day here cometh the said *John*, by his said attorney, and the sheriff, to wit, *Alexander Brander*, Esquire, and Sir *Benjamin Tabbs*, Knight, sheriff of the said county, now return here a certain inquisition taken before him at his office in *Took's-court, Cursitor-street*, in the said county, on the day of in the thirty-third year of his present majesty's reign, by the oath of twelve good and lawful men of his county, by which it is found, that the said *John* hath sustained damages, by occasion of the premises, besides his costs and charges by him laid out about his suit in this behalf, to 50*l.* 9*s.* 5*d.*, and for those costs and charges to 20*s.* Therefore it is considered, that the said *John* recover against the said *Richard* his damages aforesaid to 51*l.* 9*s.* 5*d.* by the inquisition aforesaid in form aforesaid found; and also 16*l.* 10*s.* 7*d.* to the said *John*, at his request, for his costs and charges aforesaid, by the court here of increase adjudged; which said damages, in the whole, amount to 68*l.*; and the said *Richard*, in mercy, &c.

Continuance and
return of the
inquisition.

Judgment signed
the day
of 1793.

Mercy.

Judgment by
cognovit actionem
in case.

And the said *Richard*, by *J. T.* his attorney, comes and defends the wrong and injury, when, &c. and says, That he cannot deny the said action of the said *John*, nor but that he did undertake and promise, in manner and form as the said *John* hath above thereof complained against him; nor but that the said *John* hath sustained damages, by occasion of the non-performance of the said several promises and undertakings, to 50*l.* as he the said *John* hath above in his said declaration supposed; and hereupon the said *John* prays, That the said damages so acknowledged, together with his expences and costs, laid out by him about his suit in this behalf, may be adjudged to him, &c. Therefore it is considered, That the said *John* recover against the said *Richard*

Judgment signed
10th Nov. 1793.

his damages aforesaid, so by him in form aforesaid acknowledged, and also 12*l.* for his costs and charges by the court here adjudged to the said *John*, by his assent, which said damages, in the whole, amount to 60*l.* and the said *Richard*, in mercy, &c.

Mercy.

London, to wit, *C. D.* late of *London*, yeoman, was summoned to answer *A. B.* in a plea, that he render to him 100*l.* &c. to suit, &c. Then begin with a new line and enter judgment thus :

Judgment by *nil*
ditto in debt.

And the said *C. D.* in his own person comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *A.* by which the said *A.* remains therein undefended against the said *C.* Therefore it is considered, That the said *A.* recover against the said *C.* his said debt, and also 5*l.* for his damages which he hath sustained, as well by reason of the detaining the said debt, as for his costs and charges by him about his suit in this behalf expended by the court here adjudged to the said *A.* by his assent: and the said *C.* in mercy, &c.

Judgment signed
11th day of
Nov. 1793.

Mercy.

Cognovit actionem
in debt.

And the said *C.* by *J. D.* his attorney, comes and defends the wrong and injury, when, &c. and says that he cannot deny the said action of the said *A.* nor but that he owes to the said *A.* the said 50*l.* in manner and form as the said *A.* hath above in his said declaration alledged ; It is therefore considered, That the said *A.* recover against the said *C.* his said debt, and also 5*l.* for his damages which he hath sustained, as well by reason of the detaining the said debt, as for his costs and charges by him about his suit in this behalf expended, adjudged to the said *A.* by his assent : and the said *C.* in mercy, &c.

Judgment
signed, &c.

Mercy.

Cognovit actionem
in debt on bond.

And the said *C.* by *J. D.* his attorney, comes and defends the wrong and injury, when, &c. and says that he cannot deny but that the said writing obligatory is the deed of him the said *C.* nor but that he owes to the said *A.* the said 100*l.* in manner and form as the said *A.* hath above declared against him, It is therefore considered, &c. as before.

And the said C. by J. S. his attorney, comes and defends the wrong and injury, when, &c. and the same attorney of the said C. says, That he is not informed by the said C. of any answer to be given for the said C. to the said A. in the plea aforesaid; and the said C. says nothing in bar or preclusion of the said action of the said A. by which the said A. remains therein undefended against the said C. *It is therefore considered*, That the said A. recover against the said C. his said debt, and also 10*l.* for his damages which he hath sustained, as well by reason of the detaining the said debt, as for his costs and charges by him about his suit in this behalf expended, by the court here adjudged to the said A. by his assent: and the said C. in mercy, &c.

Judgment by
non sum informatus
in debt.

And the said C. by J. K. her attorney, comes and defends the wrong and injury, when, &c. and says, That she cannot deny the said action of the said A. nor but that the said bond is the deed of the said F. nor but that she the said C. administratrix as aforesaid, detains from the said A. the said 100*l.* in manner and form as the said A. hath above thereof complained against her; *Therefore it is considered*, That the said A. recover against the said C. administratrix as aforesaid, his said debt, and also 6*l.* 10*s.* for his damages which he hath sustained, as well by occasion of the detaining the said debt, as for his costs and charges by him about his suit in this behalf expended, adjudged to the said A. by his assent, to be levied of the goods and chattels which were of the said F. at the time of his death in her hands to be administered, if she hath so much thereof in her hands to be administered; and if she hath not so much thereof in her hands to be administered, then the said 6*l.* 10*s.* being the damages, costs, and charges aforesaid, to be levied of the proper goods and chattels of the said C.; and the said C. in mercy, &c.

Judgment by
cognovit against
an administrator
in debt.

Judgment signed
day of
1793.

Mercy.

And the said C. by J. K. her attorney, comes and defends the wrong and injury, when, &c. and says, That she cannot deny the said action of the said

The like judgment
in case.

Judgment signed
day of
1793.

Mercy.

Judgment on
demurrer to the
replication.

said *A.* nor but that the said *F.* in his life-time, did undertake and promise, in manner and form as the said *A.* hath above thereof complained against him, nor but that the said *A.* hath sustained damages by reason of the not performing the said several promises and undertakings in the said declaration mentioned to 25 *l.* as the said *A.* hath above supposed; and upon this the said *A.* prays judgment, and his damages so acknowledged, together with his costs and charges by him about his suit in this behalf expended to be adjudged to him, &c. *Therefore it is considered,* That the said *A.* recover against the said *C.* administratrix as aforesaid, his said damages, so above acknowledged, and also 6 *l.* 10 *s.* for his costs and charges by him laid out about his suit in this behalf, adjudged to the said *A.* by his assent, to be levied of the goods and chattels which were of the said *F.* at the time of his death, in her hands to be administered; if she hath so much thereof in her hands to be administered; and if she hath not so much thereof in her hands to be administered, then the said 6 *l.* 10 *s.* being the costs and charges aforesaid so adjudged to the said *A.* to be levied of the proper goods and chattels of the said *C.*; and the said *C.* in mercy, &c.

To the end of the demurrer book. At which day, came here the parties aforesaid, by their attornies aforesaid, and hereupon the premises being seen by the said court here, and fully understood, it appears to the said court here, that the said plea of the said *A.* by way of reply to the said plea of the said *C.* and the matters therein contained, are sufficient in law for the said *A.* to have and maintain his said action against the said *C.* as the said *A.* hath above alledged, for which the said *A.* ought to recover his damages by occasion of the premises; but because it is unknown to the court here, what damages the said *A.* hath sustained by the means aforesaid, the sheriffs are commanded (as in a judgment by default), p. 480.

Enter

Enter all the proceedings to the end of the issue, then go on thus: On which day comes here the said *C.* by his said attorney; and the said *A.* (although solemnly called) cometh not; and it appearing to the court here, that the said *A.* hath neglected to bring the issue above joined on to be tried according to the course and practice of the said court; therefore, according to the form of the statute in such case made and provided, *It is considered*, by the said court here, that the said *A.* take nothing by his said writ, but that he and his pledges to prosecute, to wit, *John Doe* and *Richard Roe*, be in mercy, &c.; and that the said *A.* go thereof without day. *And it is further considered*, that the said *C.* recover against the said *A.* 14 l. 10 s. for his costs and charges, by him, about his defence in this behalf sustained, and adjudged by the court here to the said *C.* at his request, according to the form of the statute in that case made and provided; and that the said *C.* have his execution thereof, &c.

Judgment as in the case of a nonsuit.

To the end of the issue. At which day here come the parties aforesaid, by their attorney aforesaid; and the said *C. D.* hath not here in court the record of the said judgment by him above in his plea aforesaid alledged, but makes default of producing the said record. *Therefore it is considered*, that the said *A.* ought to recover his damages by reason of the premises; but because it is unknown to the court here what damages the said *A.* hath sustained by the means aforesaid, the sheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages, &c. (as in a judgment by default), p. 480.

Judgment on a replication of nul tiel record, on a rule to produce.

Enter to the end of the defendant's plea, then say; And hereupon the said *C.* by his said attorney, comes and relinquishes his said plea by him above pleaded, and saith, That he cannot deny the said action of the said *A.* nor but that he did undertake and promise, in manner and form as the said *A.* hath above complained against him; nor but that the said *A.* hath sustained damages by

Judgment of after-plea pleaded, where defendant withdraws his plea.

Relicta verificatione is where defendant relinquishes his plea, and thereupon judgment is entered for the plaintiff.

Judgment of non-pros for not replying.

occasion of the non-performance of the said several promises and undertakings, to 20*l.* as he the said *A.* hath above, in his said declaration, supposed: and upon this the said *A.* prays, that the said damages so acknowledged, together with his costs and charges laid out by him about his suit in this behalf, may be adjudged to him, &c. *Therefore, it is considered,* that the said *A.* recover against the said *C.* his damages, aforesaid so by him in form aforesaid acknowledged, and also 10*l.* for his costs and charges by the court here adjudged, to the said *A.* by his assent, which said damages in the whole amount to 30*l.* And the said *C.* in mercy, &c.

And the said *A.* prays a day to reply to the said plea of the said *B.* and it is granted to him, &c. And hereupon a day is given to the said *A.* before our said justices at *Westminster* until on the morrow of *All Souls* for the said *A.* to reply, &c.; the same day is given to the said *B.* here, &c. At which day comes here the said *B.* by his said attorney, and the said *A.* although solemnly called, cometh not, but maketh default, *Therefore it is considered* by the court here, that the said *A.* take nothing by his said writ, but that he and his pledges to prosecute be amerced, and that the said *B.* may depart the court here without day for ever dismissed therefrom: *It is also considered,* that the said *B.* recover against the said *A.* 10*l.* for his costs and charges, by him about his defence in this behalf expended, adjudged by the court here to the said *B.* by his assent, according to the form of the statute, &c. And that the said *B.* have his execution thereof, &c.

Execution.

AN execution is a judicial writ, grounded on the judgment of the court from whence it issues; and granted at the request of the party at whose suit it is, to render him satisfaction of the judgment which he hath obtained. Vide p. 7

There are three sorts, commonly in use, for obtaining satisfaction of the plaintiff's demand, and his costs adjudged to him by the court.

1. A *capias ad satisfaciendum*, which imprisons Ca. sa.] the body of the debtor, till he makes satisfaction to the plaintiff the demand recovered; but this writ cannot be issued against *peers or members of parliament*. Whenever the body is taken, no other process can be sued against the goods, lands, or tenements of the defendant; for as *corpus humanum non recipit estimationem*, so it is deemed the greatest and highest satisfaction one man can have of another. But if the defendant die in execution, the plaintiff may now, by *Stat. 21 Jac. I. c. 22*, sue out execution against his lands, goods, or chattels, at his election.

2. A *fieri facias* against the goods and chattels Fi. sa. of the defendant only, which lies as well against peers and members of parliament, as other common persons, and against executors or administrators with regard to the goods of the deceased.

3. An *elegit* against the goods and chattels, (except oxen and beasts of the plough,) and also one half of the defendant's land to be holden by the plaintiff at an estimate made thereof by the sheriff until the debt, or damages, and costs, are satisfied. Elegit.

The writ of *capias ad satisfaciendum* is to be Ca. sa. in what issued in the county where the *venue is laid*, and if county. the defendant is not to be met within that county, a *testatum capias ad satisfaciendum* may be issued into any

any other county, the sheriff having returned the first writ *non est inventus*. These writs may both issue the same day, but to ground the *testatum*, it is necessary the *ca. sa.* be sued out. *Bond v. Jacob and others. Barnes 200.* But the court will not inquire nicely when the *ca. sa.* or *fi. fa.* issued to ground the *testatum*. For it has been held sufficient if it be produced and returned. *Sweetapple v. Atterbury. Barnes 211. 208. Burdys v. Satchwell.*

It is to be ingrossed on a 2s. 6d. stamp and signed by prothonotaries, pay signing the *ca. sa.* 4d. seal 7d. *testatum*, 8d. signing, seal 7d.

If levied in debt on bond.

If the judgment be in debt on bond, levy the money due to plaintiff, with the expences of the levy and *sheriff's poundage*, which is taken out of the penalty.

If in case.

If it be levied upon a judgment in case, then only levy the damages recovered with the costs; in this case, add the costs to the damages recovered, and they are *all called damages in the writ*.

Cannot be two executions.

There ought not to be two executions existing at the same time, *Str. 515.* but you may have a *fi. fa.* first, and if the sheriff does not levy to the amount of the debt; or damages recovered, you may have a *ca. sa.* for the residue; in such case, the sheriff should return the *fi. fa.* *Salk. 318.* and the levy thereon first, which ought to be recited in the *ca. sa.* *Vide Coppendale v. Debonnair. Barnes 213. 1 Roll Abr. 904. Cro. Eliz. 344.* but if he does nothing on the *fi. fa.* then there is no necessity to take notice thereof in the *ca. sa.* of its having issued.

An *elegit* may be had after a *fi. fa.*

An *elegit* may be had after a *fi. fa.* but if once the body is taken, there cannot be a *fi. fa.* or *elegit*; for the body is deemed the highest satisfaction the plaintiff can have.

To be sued out within a year and a day.

These executions must be sued out within a year and a day after the judgment signed; and the time is to be accounted from the day of signing the judgment. *Barnes 197. Sympson v. Gray.*

But

But if it be sued out and returned within the year, there needs no *scire facias* before you sue out another: and it is usual to award the first on the roll with the sheriff's return thereon, but an execution cannot be awarded on the roll, which was never returned or filed. *Player v. Baldwin.* 2 Will. 82.

This writ may be sued after an *elegit* executed only on the goods. *Str.* 226.

Ca. sa. in debt.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, &c. To the sheriff of *Middlesex*, greeting: We command you, that you take C. D. late of *Westminster*, in your county, yeoman, if he be found in your bailiwick, and him safely keep, so that you have his body before our justices at *Westminster*, on the morrow of *All Souls*, to satisfy A. B. of 2,100*l.* debt, which the said A. B. lately in our court, before our justices at *Westminster*, recovered against him; and also sixty-three shillings, which in our same court were adjudged to the said A. for his damages, which he had by occasion of the detaining that debt, whereof the said C. D. is convicted; and have

The like in case.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, &c. To the sheriffs of *London*, greeting: We command you, that you take *Richard Fenn*, late of *London*, yeoman, if he be found in your bailiwick, and him safely keep, so that you have his body before our justices at *Westminster*, on the morrow of *All Souls*, to satisfy *John Denn* 500*l.*; which were adjudged to the said *John* in our same court, before our justices at *Westminster*, for his damages, which he had, by reason of the non-performance of certain promises and undertakings, made by the said *Richard* to the said *John* at *London*, whereof the said *Richard* is convicted; and have there this

If taken out and returned in the year.

have there this writ.
Witness, Sir *James Eyre*
Knight, at *Westminster*,
the 19th day of *June*, in
the 33d year of our reign.

John Nixon.

*Levy 653l. 3s. besides
poundage, officers fees, and
all other incidental ex-
pences.*

this writ. Witness, Sir
James Eyre Knight, at
Westminster, the 19th
day of *June*, in the 33d
year of our reign.

John Nixon.

Levy the whole.

*Ca. sa. in case,
not on promise.*

For his damages which he hath sustained, as
well by occasion of a certain trespass on the case,
done to the said *Henry* by the said *John*, as for his
costs and charges by him expended in, and about
his said suit, whereof the said *John* is convicted;
and have there, &c.

In covenant.

For his damages, which
he had, by reason of a
certain breach of cove-
nant, made between the
said *John* and *Richard*,
whereof the said *Richard*
is convicted, &c.

In ejectment for damages.

For his damages, which
he had, by occasion of a
certain trespass and eject-
ment of farm, done to
the said *John*, by the said
Richard, at *L.* in your
county.

Trespass and Assault.

For his damages, which
he had, by occasion of a
certain trespass and as-
sault, made on the said
John by the said *Richard*,
at *Westminster*, in your
county; whereof, &c.

Replevin.

For his damages, which
he had, by occasion of
the taking and unjustly
detaining the cattle of
the said *John*, at *W.* in
a certain place called
the *H.* in your county;
whereof, &c.

Trespass.

For his damages, which
he had sustained, by oc-
casion of a certain tref-
pass

For words.

For his damages, which
he had, by occasion of
the speaking and pub-
lishing

pals done to the said
John, by the said Richard,
at L. in your county.

lishing certain false and
scandalous words by the
said Richard of the said
John, at London, in your
bailiwick; whereof, &c.

For the defendant.

To satisfy Richard
Fenn, 14 l. 10 s. which
were adjudged to the
said Richard in our court,
before our justices at
Westminster, through the
discretion of the said
justices, according to the
form of the statute in
such case made and pro-
vided, for his costs and
charges by him laid out
about his defence, in a
certain plea of trespass*,
on the case, prosecuted in
our said court, by the
said John against the said
Richard; and have you
there this writ. Wit-
ness, &c.

On a nonsuit.

To satisfy Richard
Fenn, 12 l. 10 s. which
were adjudged to the
said Richard in our court,
before our justices, at
Westminster, through the
discretion of the said
justices, according to the
form of the statute in
such case made and pro-
vided, for his costs and
charges which he hath
sustained, by reason of
the false claim of the said
John, in a certain plea
of trespass on the case,
prosecuted in our said
court, by the said John
against the said Richard;
and have, &c.

* As the action

In a penal action.

To satisfy us and John
Denn, who sues as well
for us as himself in this
behalf, 450 l. debt, which
the said John, who sues
as aforesaid, in our court,
before our justices at
Westminster, recovered
against the said Richard
(that is to say) one
moiety thereof, to wit,
225 l. to the said John
who

For an administrator.

To satisfy John Denn,
administrator of all and
singular the goods and
chattels, rights and cre-
dits, which were of
James Wren, deceased,
who died intestate, for
1000 l. debt; and also
16 l. 10 s. for his da-
mages, which he sustain-
ed, as well by occasion
of the detaining the said
debt,

who sues as aforesaid, to his own proper use, and the other moiety thereof to our own proper use, according to the form of the statute in such case made and provided; whereof the said *Richard* is convicted and have there, &c.

Where the Sheriff can levy money already in his hands.

Defendant arrested by a *ca. sa.* paid the money to the sheriff's officer; before the return, defendant delivered to same sheriff a *fi. sa.* against the plaintiff, who levied the sum out of the money in his hands by the *ca. sa.*, and returned the *ca. sa.* to the above effect, the court held it insufficient, and ordered the sheriff to pay the money upon the *ca. sa.* to the plaintiff, deducting his poundage. *Barnes* 214.

If after *sci. fa.*

If the execution be taken out after a *sci. fa.* then, after the words, "*whereof he is convicted*," say, "And whereof in our said court, before our justices, it is considered, That the said *John* have his execution against the said *Richard* of the debt and damages aforesaid, by the default of the said *Richard*; and have there this writ. Witnesses &c."

Ca. sa. amended.

A *ca. sa.* may be amended after executed, by making it returnable before our justices, instead of before us, on paying costs. *Hunt v. Kendrick* 2 *Black. Rep.* 836. *T. Jones* 41. *Barnes* 10 *Browne v. Hammond*, by making defendant's name *Edmund* instead of *Edward*. These are amended by the award of the writ on the roll, so you amend the teste of a *fi. sa.* *Ibid.*

When *testatum* necessary.

If the defendant is not to be found in the county where the *venue* is laid, you must then sue out *testatum*, which is done in the first instance (but *ca. sa.* ought first to issue to warrant the *testatum*) the form of which is as follows:

Vide Barnes 211.

George

George, &c. (to the end of the first writ, "con-
Testatum ca. fa.
 victed"). And our said sheriff of *Middlesex*, at
 a certain day now past, returned to our justices at
Westminster, That the said *Richard* was not found
 in his bailiwick; whereas it is testified in our said
 court, That the said *Richard* lurks and wanders up
 and down in your county; and have there this
 writ. Witness, &c. pay signing at prothonotaries
 8d. seal of *ca. fa.* and this writ 1 s. 2d.

This writ lies not against *peers* of the realm or
 their wives, *peers* of Scotland, nor against members
 of parliament, nor executors, or administrators, for
 debt of their testator or intestate.

It does not lie
 against peers of
 members.

But it lies against *peers* on a statute merchant, or
 statute staple, 11 *Ed. 1.* 27 *Ed. 3.* or on a recog-
 nizance in the nature of a statute staple, 23 *H. 8.*
 c. 6.

The sheriff is intitled to poundage for no greater
 sum than the real debt *bona fide* due; which sum
 should be marked on the back of the writ before
 delivery, 3 *Geo. 1.* c. 15. s. 17.

Fieri Facias.

This writ was the only writ of execution that
 lay at common law, and was afterwards confirmed
 by the stat. of *West. 2.* And lies against the goods
 and chattels of peers and members of parliament,
 as other common persons, and against executors,
 or administrators, with regard to the goods of the
 deceased, as for costs awarded against them for
 false pleading, or confession of judgments, if no
 goods or chattels of the testator are to be met with
 for those costs.

If part only be levied, the plaintiff may have a
ca. fa. for the residue, but he should recite the she-
 riff's return on the first writ. 1 *Roll. Abr.* 904.
Cro. Eliz. 344.

This writ is to be ingrossed on a 2d. 6d. stamp
 parchment, signed by the prothonotaries, and seal-
 ed; and is to issue only in the county where the
How sued.
venue

venue is laid. The stationers have them ready printed. If it be wanted in another county, it is called a *testatum*.

Teste.

There need not *fifteen days* between the *teste* and return of any *ca. sa.* or *fi. sa.* (except to fix bail or in outlawry). *Stat. 13 Car. 2. c. 2. s. 7, 8.*

Teste if sued out in the term.

If it be sued out in *term* time, *teste* the writ the *first day* of the term (although the judgment is not signed till *four days* after); if out of term, *teste* it the *last day* of term.

Goods bound from delivery.

By *Stat. 29 Car. 2.* the goods are bound only from the time of the delivery of the writ to the sheriff; but lands are bound from the day of the judgment.

If all not levied.

If all the money is not levied, the writ must be returned before a second execution can be made out, because the second is granted on the deficiency of the first. *Salk. 318.* And the first sheriff's return must be recited. *ibid.*

On an annuity bond and judgment thereon for the penalty, the arrears of the annuity can only be levied: but then the judgment shall stand as a future security for arrears. *2 Black. Rep. 1111.*

The court will not stay goods taken by a *fi. sa.* in the hands of the sheriff, till a dispute concerning the property of them is decided, unless for the protection, and at the instance and request of the sheriff. *2 Black. Rep. 1064.*

Fraudulent *fi. sa.* not good.

A *fieri facias* being executed fraudulently, a *fi. sa.* at the suit of another afterwards, shall stand good, and be preferred. *1 Wils. 44. Bradley v. Wyndham.*

Sheriff who begun the execution, shall end it.

The sheriff, that begun the execution, shall end it, though he is out of office, *Salk. 323.*; and may sell goods after he is out of his office, without a *venditioni exponas*. *Lord Raym. 990. 1073.*

If sheriff return levied, and that the goods remain for want of buyers, a *vend. expon.* issues.

If the sheriff return, That he has levied the goods, and that they remain in his hands for want of buyers, and he continues in office, a *venditioni exponas* issues to make sale thereof, by which he is compelled to make sale. If he be out of office be-

fore he makes sale, then sue out a *distringas*, directed to the new sheriff, to distrain the old sheriff to sell; whereby he is compellable so to do; or you may move for issues against him to the value of the goods. 6 *Mod.* 295, 396.

On a *fi. fa.* upon a judgment against one partner, the sheriff may take the goods of both, and the vendee shall have a moiety in common with the other. *Comb.* 217.

If a man died in execution, formerly his executors were no farther chargeable; but now, by *Stat.* 21 *Jac.* 1. c. 24. "though he do die in execution, yet the plaintiff may have an execution against his lands, goods, and chattels." But the judgment must be revived by a *sci. fa.*

It does not abate by the plaintiff's death; but the sheriff must go on to execute his writ. *Mod.* *Ca. L. & Eq.* 225. *Salk.* 322. 6 *Mod.* 290.

If plaintiff dies after verdict and before the day in bank, though the judgment be right, yet a *sci. fa.* must be awarded before execution. 1 *Wils.* 302. *Earl v. Brown.*

If a defendant die after the first day of term, yet plaintiff may have execution against his goods, because the judgment has reference to the first day of the term. *Gilb. L. of Ex.* 46. So if plaintiff dies after *fi. fa.* sued out, it may be executed. *Gro. Eliz.* 459.

Judgment in debt on bond, the court was of opinion that in all cases the prothonotary should allow interest and costs from the time of the judgment to the completing the execution. *Daking v. Thornbil.* *Cooke's Rep.* 90. *Pract. Reg.* 213. C.

After a *fi. fa.* executed and part levied. Plaintiff before the return, sues out a *testatum* and levies the residue, held irregular, set aside and restitution granted with costs, defendant to bring no action. *Appendale v. Debonnaire.* *Barnes* 213.

A landlord is entitled to a year's rent in the case of an execution, without deduction, and the sheriff must

Fi. fa. against one partner may take goods of both.

If a man die in execution, may have a *fi. fa.*

Execution does not abate by plaintiff's death.

After verdict plaintiff dies.

If defendant dies.

Interest and costs.

Testatum after a *fi. fa.* executed, held bad, no sheriff's return.

Landlord must give sheriff notice.

must take care of him, 8 *Ann. c. 14. s. 1.*; but a ground landlord cannot come in for a year's rent on an execution against an under lessee; for the statute only extends to the immediate landlord, *Str. 787.*; but the landlord must give the sheriff notice, or he is not bound. 1 *Sir. 97. 2 Will. 140.*

The writ of *fi. fa.* must be issued in the county where the venue is laid; if no goods there, then a writ of *testatum* may issue into any other county.

Fi. fa. in case.

George the Third, &c.
To the sheriff of Gloucestershire, greeting: We command you, That you cause to be levied of the goods and chattels in your bailiwick of *C. D.* late of Gloucester, in your county, yeoman, 50 *l.* which *A. B.* in our court, before our justices at *Westminster*, recovered against him, for his damages, which he had, by means of the not performing certain promises and undertakings lately made by the said *C.* to the said *A. B.* at Gloucester*, in your county; whereof the said *C.* is convicted: and have you that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A. B.* for his damages aforesaid; and have

* Where venue is laid.

Fi. fa. in debt.

George the Third, &c.
To the sheriff of Middlesex, greeting: We command you, That you cause to be levied of the goods and chattels in your bailiwick of *C. D.* late of *W.* in your county, yeoman, as well a certain debt of 60 *l.* which *A. B.* in our court, before our justices at *Westminster*, recovered against him, as also 63 *s.* which were awarded to the said *A. B.* in our said court, for his damages, which he had by occasion of the detaining the said debt, and have you that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A.* for his debt and damages aforesaid; whereof the said *C.* is convicted; and have

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George
sheriffs of
g: We

have there this writ. have there this writ.
 Witness, Sir James Eyre Knight, at Westminster,
 the 19th day of July, in the 33d year of our reign.

If after a scire facias : after the words, whereof the said C. is convicted, say, And whereof it is considered in our same court, That the said A. have his execution against the said B. of the debt and damages aforesaid by the default of the said B. ; and have there this writ. Witness, &c. After a sci. fa.

If in assault, say, For his damages, by reason of a certain trespass and assault, lately committed by the said C. on the said A. at Westminster, in your county. The like in assault.

If in covenant, For his damages, which he sustained, by reason of a certain breach of covenant made between the said C. and the said A. The like in covenant.

For his damages, which he sustained, by reason of a certain trespass and ejectment committed against the said A. by the said C. at E. in your county. The like in ejectment.

In case there be no goods in the county where the venue is laid, then you may have a *testatum fi. fa.* into another county ; but a *fi. fa.* should first be issued into the county where the venue is laid, in order to ground this second writ ; the first writ need not be returned and filed before the *testatum* issues. *Bond v. Jacob. Barnes 200.* They are now both sued out at the same time. But leave the first with the sheriff, for a return of *nulla bona*.

The seal office have now orders not to seal a writ that is returnable, therefore both writs may be returnable the same day ; and I have altered the *testatum* part accordingly.

<i>Testatum fi. fa.</i> in case.	<i>Testatum fi. fa.</i> in debt.
George, &c. To the	George, &c. To the
sheriffs of London, greet-	sheriff of Middlesex,
ing: We command you,	greeting, &c. (to the end
That	K k of

That you cause to be levied of the goods and chattels, &c. (*to the end of the first fi. fa.*) whereof the said C. is convicted: and our sheriff of *Middlesex* hath sent to our said justices, That the said C. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof: whereas it is testified in our same court, That the said C. hath sufficient goods and chattels in your bailiwick, whereof you may cause to be levied the damages aforesaid, and every part thereof; and have there this writ. Witness, &c.

A non omittas fi. fa.

George, &c. To the sheriff of *Norfolk*, greeting: We command you, That you omit not, by reason of any liberty in your bailiwick; but that you enter the same, and cause to be levied of the goods and chattels in your bailiwick of C. D. late of, &c. (*the same as a fi. fa.*).

Testatum.

of the fi. fa.) whereof the said C. is convicted: and our sheriffs of *London* have sent to our justices, That the said C. had not any goods or chattels in their bailiwick, whereof they could cause to be levied the debt and damages aforesaid, or any part thereof: whereas it is testified in our same court, That the said C. hath sufficient goods and chattels in your bailiwick, whereof you may cause to be levied the debt and damages aforesaid, and every part thereof; and have you there this writ. Witness, &c.

Fi. fa. for the residue in debt.

George, &c. greeting: Whereas we lately commanded you that you should cause to be levied of the goods and chattels in your bailiwick, of C. D. late of *W.* in your county, yeoman, as we a certain debt of 100 which *A. B.* in our court before our justices of *Westminster*, recovered against him, as also 63

Testatum fi. fa. into Durham, in case.

George, &c. To the Reverend Father in God, by divine Providence lord bishop of *Durham*, greeting: We command you, That by our writ, under the seal of your bishoprick duly to be made, and to the sheriff of the county of *Durham*, to be directed, you command the said sheriff, that of the goods and chattels of *C. D.* late of, &c. in his bailiwick, he cause to be made 50*l.*; which *A. B.* lately in our court, before our justices, at *Westminster*, recovered against him, for his damages, which he had, by means of the not performing certain promises and undertakings, lately made by the said *C.* to the said *A. B.* at *Westminster*, in the county of *Middlesex*; whereof the said *C.* was convicted; and have you the said money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A. B.* for his damages afore-said; and our sheriff of *Middlesex* hath returned also 63*l.* which your said justices, That the

which was awarded to the said *A.* in our said court, for his damages, which he had by occasion of the detaining the said debt; and that you should have that money before our justices at *Westminster*, in three weeks of the *Holy Trinity*, now last past, to render to the said *A.* for his debt and damages afore-said, whereof the said *C.* is convicted; and you at that day returned to our said justices, That by virtue of that writ to you directed, you had caused to be made of the goods and chattels of the said *C.* the sum of 40*l.* part of the debt and damages, in the said writ mentioned; which money you had ready at the day and place in the writ mentioned, as by the said writ you was commanded; and that the said *C.* had not any other, or more goods or chattels in your bailiwick, whereof you could cause to be levied the residue of the said debt and damages, or any part thereof; therefore we command you, that you cause to be levied of the goods and

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chattels

the said *C.* had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof: whereas it is testified in our same court, That the said *C.* hath sufficient goods and chattels in your county palatine; whereof the sheriff of your county palatine may cause to be levied the damages aforesaid, and every part thereof; and have you there this writ. Witness, &c.

chattels of the said *C.* in your bailiwick, 63*l.* 3*s.* residue of the said sum of 103*l.* 3*s.* which the said *A.* recovered against him in our same court, for his said debt and damages; and that you have that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A.* for the residue of the debt and damages aforesaid; and have you there this writ. Witness, &c.

Fi. fa. de bonis ecclesiasticis, in debt.

George, &c. To the Right Reverend Father

in God, , by divine Providence lord bishop of *Lincoln*, greeting: We command you, That of the ecclesiastical goods of *C. D.* late of, &c. clerk, in your diocese, you cause to be levied 1000*l.* for a debt, which *A. B.* in our court, before our justices at *Westminster*, recovered against him; as also 63*s.* which were adjudged to the said *A. B.* in our same court, for his damages, which he had, by occasion of the detaining that debt; and have you that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A. B.* for his debt and damages aforesaid, whereof the said *C.* is convicted: and our sheriff of *Middlesex*, in three weeks of the *Holy Trinity* last past, sent to our justices at *Westminster*, That the said *C. D.* had not any goods or chattels, nor any lay fee in his bailiwick, whereof he could cause to be levied the debt and damages aforesaid, or any part thereof; and that the said *C. D.* is a beneficed clerk, to wit, rector of the parish and parish church of *W.* in the county of *B.* in your diocese;

diocese; and have you there this writ. Witness, &c. To be signed by the prothonotaries (pay 1 s. 4 d. seal 7 d.) and sent to the register of the diocese, who will make out a sequestration, the plaintiff first giving security by bond to the bishop.

Fi. fa. against an executor, where he confesses the debt of the testator.

George, &c. We command you, That you cause to be levied of the goods and chattels in your bailiwick, which were of *C. D.* at the time of his death, in the hands of *E. B.* administratrix of all and singular the goods and chattels, rights and credits, which were of the said *C.* deceased, at the time of his death, who died intestate, to be administered, 40 l. which to *A. B.* in our court, before our justices at *Westminster*, were adjudged to him for his damages, costs and charges, which he had, by reason of the non-performance of certain promises and undertakings made by the said *C. D.* in his life-time to the said *A.* at *W.* in your county, if she has so much goods and chattels in her hands to be administered; and if she hath not so much there-

Fi. fa. against an administratrix in debt.

George, &c. We command you, That of the goods and chattels which were of *C. D.* at the time of his death, in the hands of *E. B.* widow, administratrix of all and singular the goods and chattels, rights and credits, which were of the said *C.* at the time of his death, who died intestate, to be administered in your bailiwick, you cause to be levied 530 l. debt, which *A. B.* lately in our court, before our justices at *Westminster*, recovered against the said *E. B.* administratrix as aforesaid; and also 16 l. which in our said court were adjudged to the said *A.* for his damages, costs, and charges which he had, by means of detaining the said debt, if she hath so much goods and chattels of the said *C.* at the time of his death in her hands to be administered; and if she hath

The costs taxed.

of

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hath

Costs taxed.

of in her hands to be administered, then that you cause to be levied 6*l.* 10*s.* being the costs and charges of the said *A.* and parcel of the damages aforesaid of the proper goods and chattels of the said *E.*; and have you that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A.* for his damages and costs aforesaid, whereof the said *E. B.* is convicted; and have you there this writ. Witness, &c.

hath not so much thereof in her hands to be administered, then that you cause to be levied the said 16*l.* the damages, costs, and charges aforesaid, of the proper goods and chattels of the said *E. B.*; and have you that money before our justices at *Westminster*, on the morrow of *All Souls*, to render to the said *A.* for his debt and damages aforesaid, whereof the said *E. B.* is convicted; and have you there this writ. Witness, &c.

If against executor.

If it be against an executor, add the words, Executor of the last will and testament of, &c. deceased.

Fi. fa. for defendant's costs in case.

George, &c. That you cause to be levied of the goods and chattels of *A. B.* in your bailiwick 14*l.* 10*s.* which were awarded to *J. D.* in our court, before our justices at *Westminster*, through the discretion of the said justices, according to the form of the statute in such case made and provided, for his costs and charges by him expended in and about his defence, in a certain plea of trespass on the case (*as the action is*), prosecuted in our said court, by the said *A.* against the said *J. D.*; and have you that money before our justices at *Westminster*, in, &c.; and have there this writ. Witness, &c.

For costs on a nonsuit.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: We command

Venditioni exponas.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas we lately

mand you, That you
cause to be levied of the
goods and chattels in
your bailiwick, of *A. B.*
14*l.* which were award-
ed to *C. D.* in our court,
before our justices at
Westminster, according
to the form of the sta-
tute in such case made
and provided, through
the discretion of the said
justices, for his expences
and costs, which he had
been put to, by reason
of the false claim of the
said *A.* in a certain plea
of trespass on the case
prosecuted in our said
court by the said *A.*
against the said *C.*; and
have you that money
before our justices at
Westminster, &c. Wit-
ness, &c.

lately commanded you,
That you should cause
to be levied of the goods
and chattels of *C. D.*
late of, &c. 30*l.* which
A. B. lately in our court,
before our justices at
Westminster, recovered
against him for a debt;
and also 63*s.* which, &c.
(*here recite the writ of fi.
fa. verbatim*); and that
you should have that
money before our justices
at *Westminster*, on, &c.
to render to the said *A.*
for his debt and damages
aforesaid, whereof the
said *C.* is convicted: and
you at that day sent to
our said justices at *West-
minster*, That you had
caused to be levied the
goods and chattels of
the said *C.* to the value
of the debt and damages
aforesaid; which said goods and chattels re-
mained in your hands for want of buyers; there-
fore we being desirous that the said *A.* be satisfied
his said debt and damages, command you, That
you sell, or cause to be sold, the said goods and
chattels, and every part thereof, for the best price
that can be got for the same, and at least for the
debt and damages aforesaid; so that you have that
money arising from such sale, before our justices
at *Westminster*, on the morrow of *All Souls*, to ren-
der to the said *A. B.* for his debt and damages afore-
said; and have you there this writ. Witness, &c.

The sheriff is bound to answer the returned value
of the goods, though they are afterwards rescued.
Lord Ray. 1075.

This writ is to be signed at the prothonotaries; pay 1 s. 4 d. seal 7 d.

If the goods are appraised at a less sum than the value of the debt and costs, then recite the sheriff's return, and say, "*to sell for the best price, &c. at least for the sum of, &c. as mentioned in the sheriff's return.*"

Elegit.

The third species of execution is by writ of *elegit*, which is a judicial writ, given by the statute of *West. 2. 13 Ed. 1. c. 18.* either on a judgment for a debt or damages, or upon forfeiture of a recognizance.

If goods taken,
they are not sold
but appraised.

If goods and chattels be taken under this writ, they are not sold by the sheriff but appraised, and all of them (except oxen and beasts of the plough) are delivered to the plaintiff at such reasonable appraisement and price, in part satisfaction of his debt, *Ld. Ray. 346.* and a *venditioni exponas* issues for the sale.

If goods are not
sufficient, then
a moiety of lands
to be delivered.

If the goods are not sufficient, then the moiety or one half of his lands, which he had at the time of the judgment given, whether held in his own name, or by any other in trust for him, are also to be delivered to the plaintiff, to hold till out of the rents and profits thereof, the debt be levied, or till the defendant's term be expired, as till the death of the defendant, if he be tenant for life or in tail. Copyholds are not liable.

And he ought to deliver a moiety in each *vill*, for a moiety of the whole is void, *1 Lev. 165.*

And the delivery of more than a moiety is void, and plaintiff in ejectment cannot recover under that title, *2 Salk. 564.*

A term of years may either be extended, or sold as part of the personalty, *8 Co. 171.* A rent-charge may be extended, *Moor. 32.* So may lands in ancient demesne, *Hob. 47.* But a rent-feeck or copyhold lands not, *Cro. El. 656. 3 Co. 9.* *Vide my Office of Sheriff, 167.*

If the lands be extended on an *elegit*, the plaintiff is for ever barred from having any other execution; but if he levies on the goods upon the *elegit*, and the sheriff return *nihil* as to the land, a *ca. sa.* may notwithstanding issue for the residue against the defendant; for the election cannot be complete, unless the plaintiff has some benefit from the land. *Sir.* 226.

If lands be extended.

Upon an *elegit* the sheriff is to impanel a jury, (but no notice thereof need be given on the other side,) who are to make enquiry of all the goods and chattels of the debtor, and to appraise the same, and also to enquire as to his lands and tenements, and upon such inquisition, the sheriff is to deliver all the goods and chattels (*except the beasts of the plough*), and a moiety of the lands, to the party, and must return his writ in order to record such inquisition. 2 *Inst.* 396.

Sheriff's duty.

The sheriff does not put the plaintiff in possession of the lands; therefore, in order to recover, he must bring an ejectment.

Sheriff does not put plaintiff in possession.

Upon executing a writ of *elegit*, *hab. fac. poss.* or *hab. fac. seisinam*, sheriff is to have 12*d.* for every 20*s.* of the yearly value of the manor, messuages, lands, tenements, &c. whereof possession or seisin is given. 29 *Eliz.* c. 4. 3 *Geo.* 1. c. 15. *f.* 16.

Poundage.

This is when the whole exceeds not the yearly value of 100*l.*: if above, then he is entitled to 6*d.* for every 20*s.* over and above the 100*l.*

Upon a *fi. fa.* or *levari fac.* he is to have 12*d.* for every 20*s.* for the first 100*l.*; and 6*d.* for every 20*s.* where the sum exceeds 100*l.* 29 *Eliz.* c. 4. But he is only entitled to poundage on so much of the goods as he makes an actual delivery in execution. *Vide* my *Office of Sheriff*, 172. *Eliz.* c. 4.

On *fi. fa.* and *lev. fac.*

Mr. Justice Buller said, The sheriff cannot be allowed the expences of an auctioneer, or even the

What fees not allowed.

the levy fee of 1*l.* 1*s.* If the plaintiff chuses an auction, he must be at the expence out of his own debt. If defendant wish to have an auction, he must have it at his own expence, and it should be no part of the sheriff's account. *Woodgate v. Knatchbull.* 2 Term Rep. 148. K. B.

If greater fees be taken than by law allowed, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved, *ibid.* though the fees be taken by the bailiff.

Though the plaintiff be not satisfied with his debt, yet if the sheriff take defendant to gaol, he must pay the poundage. *Vide my Office of Sheriff,* 145.

Elegit in debt.

To be signed by the prothonotary; pay 1*s.* 4*d.* seal 7*d.*; to be ingrossed on a 2*s.* 6*d.* stamp parchment.

George the Third, &c.
To the sheriff of *Kent*, greeting: Whereas *A. B.* lately in our court, before our justices at *Westminster*, by the consideration of the said court, recovered against *C. D.* late of, &c. * as well a certain debt of 100*l.* as 63*s.* which in our said court were adjudged to the said *A.* for his damages, which he had, by means of the detaining the said debt, whereof the said *C. D.* is convicted; and because

* As he is stated in the pleadings.

the said *A. B.* came in our court before our said justices, and by the statute in that case made and provided, chose to have delivered to him all the goods and chattels of the said *C. D.* (*except his exp*

Elegit in case.

George the Third, &c.
To the sheriff of *Kent*, greeting: Whereas *A. B.* lately in our court, before our justices at *Westminster*, by the consideration of the said court, recovered against *C. D.* late of, &c. 100*l.* which in our said court were adjudged to the said *A.* for his damages, which he had, by means of the non-performance of certain promises and undertakings made by the said *C.* to the said *A.* at *W.* in your county, whereof the said *C.* is convicted, and because

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and the beasts of his plough), and likewise a moiety of all and singular the lands and tenements of the said *C. D.* in your bailiwick, to hold to him the goods and chattels aforesaid, as his own proper goods and chattels; and also to hold the said moiety as his freehold to him and his assigns, according to the form of the said statute, until he shall thereof have levied the said debt and damages; and therefore we command you, that without delay, you cause to be delivered to the said *A.* by reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick (*except the oxen and beasts of his plough*), and likewise a moiety of all the lands and tenements of the said *C. D.* in your bailiwick, of which the said *C. D.* on the

The day judgment was signed.

day of in the 33d year of our reign (on which day the said judgment was given), was, or at any time since hath been seized to him the said *A.* to hold to him the said goods and chattels, as his own proper goods and chattels, and also to hold to him and his assigns, a moiety of the said lands and tenements as his own free tenements, according to the form of the said statute, until he shall thereof have fully levied the said debt and damages: and in what manner you shall have executed this our writ, make appear to our justices at *Westminster*, on the morrow of *All Souls*, under your seal, and the seals of them by whose oath you shall make the said extent and appraisement; and have there this writ. Witness, &c.

A man may award on the roll as many *elegits* as he pleases, and execute all, or any, at his pleasure; but it is said, if he awards an *elegit* in one county, extends the lands upon the writ, and afterwards file it, he is barred, and cannot sue out an *elegit* into another county; but an actual writ ought to be sued out.

May award as many elegits on the roll as you please, and execute all, or any.

Where by inquisition on an *elegit*, it is found that the plaintiff was seized of the lands, at the time

What proof is necessary to support an eject-

ment on an
elegit.

time the judgment was given upon an ejectment, which must be brought to recover the possession, the plaintiff need only give in evidence the office copy of the judgment, *elegit*, and inquisition thereupon filed, and is not bound to prove the party seized at the time of the judgment: and if he was not seized, it must be proved by the other side. *Gilb. L. of E.* 10. *Vide Salk.* 563. *Lord Ray.* 718.

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Scire Facias.

Of reviving Judgment by scire facias after a Year and a Day.

ALL writs of execution must be sued out *within a year and a day after final judgment signed*; otherwise the court concludes, *prima facie*, that the judgment is satisfied and extinct: yet however it will grant a *scire facias* in pursuance of the statute 13 Ed. 1. c. 45. for the defendant to shew cause *why the judgment should not be revived, and execution had against him*; or the plaintiff may still bring an *action of debt* founded on this dormant judgment, which was the only method of revival allowed by the common law. *Co. Lit.* 290. 2 *Inst.* 469.

A *scire facias quare executionem non* lies upon every judgment, upon which execution is not sued out within the year and a day, if the judgment was not given with a *cesset executio* to such a time, for then the year shall be computed from that time. *Mod. Caf.* 288.

Sci. fa. lies on every judgment.

After the year and day the *sci. fa.* lies between the same parties as were parties to the judgment; but if the plaintiff be dead, then it lies by the executor or administrator. So if defendant die, it lies against his executor or administrator. 2 *Inst.* 395.

And between same parties, unless they be dead.

It is not necessary where the judgment is suspended by error, though the year and day be passed before judgment affirmed, 1 *Salk.* 261. Nor where the judgment is affirmed, or the plaintiff is non-suited, or discontinues in error, though the year was expired before error brought. 1 *Rol.* 899. 2 *Cro.* 364. *Lane* 20.

If suspended by error.

A *scire facias* is a *judicial* not an *original writ*, but is framed out of the record; and it is in nature of an action, for a release of actions or executions discharges it. *Co. Lit.* 290. b.

A judicial writ.

If

Sci. fa. must be sued out in the county where the original action was.

If there has been no *ca. fa. fi. fa. elegit*, or *hab. fac. possessionem* sued out within the year and day, then, in order to revive the judgment, and take out execution, you must sue out a *scire facias* in the same court, and into the county where the venue was, the court supposing the defendant to reside in the same county where the original action was brought. *Hob. 4. Pract. Reg. 495.*

A *sci. fa.* to revive a judgment is a continuance of the suit. *Barnes 96. Follet v. Trill.*

No *sci. fa.* necessary, if defendant has made the delay.

This *sci. fa.* was intended to prevent a surprise upon the defendant after the year and day elapsed; but where he affects the delay, by bringing a writ of error, or it is stayed by bills of injunction, though above a year and day, yet execution may be taken out without a *scire facias*. *Vide 2 Burr. 660. Str. 301.*

In no case where parties are changed ought execution to go without *sci. fa.*

It is held, that in no case where the parties to the judgment are changed, ought execution to be sued by any other without a *sci. fa.*; therefore if the plaintiff dies before execution awarded, it cannot be sued out in his name, but there must be a *sci. fa.* *2 Ld. Raym. 768.* So on the death of the defendant the plaintiff must sue out a *sci. fa.* against his executors or administrators. *Lut. 1273.*

But if defendant die in the vacation, and the judgment be not a year old, I take it the plaintiff may levy without *sci. fa.* *1 Salk. 87. 2 Str. 1081.*

If once sued out and continued, need not sue *sci. fa.*

If a writ of execution be once sued out, returned, and entered on the roll, it may be continued until you sue out and execute a new one, and be as effectual as if new writs were issued every term. *Str. 100. 1 Sid. 59. 4 Inst. 271. Mod. Caf. 288.*

Computation of the year.

The year shall be computed from the day of signing judgment, not by the number of terms. *Barnes 197. Symphon v. Gray & Ux.*

If execution be sued after year and day without *scire facias*, it is not void, but voidable only. *3 Lev.*

404. 1 Salk. 261. *contra* 4 Leon. 197. Salk. 273.

pl. 4.

There needs no *sci. fa.* if error brought on the judgment within a year after the judgment, till a year and day after the error or judgment thereon affirmed. 5 Co. 88.

If error brought, no need of a *sci. fa.* till a year and day after affirmation.

If execution is not returned by the sheriff, or not filed, continuances on it cannot be entered on the roll; and if they are, and thereupon a *ca. fa.* after the year, without *sci. fa.* is issued, defendant shall be discharged out of custody, and plaintiff pay costs.

If execution not returned, or not filed, continuances cannot be entered.

2 Will. 82. *Blayer v. Baldwin*.

If judgment be with *cesset executio* by agreement, till such a time, there needs no *sci. fac.* till a year and day after the time agreed, though such *cesset, &c.* is not entered on the roll. *Mod. Cas.* 288.

If judgment with a *cesset executio*, needs no *sci. fa.* till year and day after time elapsed.

The husband cannot have execution for the costs on a plea of coverture found for the *feme* without a *sci. fa.* Vide *Dougl.* 637. *Wortley v. Rayner*.

Husband and wife.

An *adm. de bonis non* may now have a *sci. fa.* on a judgment recovered by a former administrator, Stat. 17 Car. 2. c. 8. *Jon.* 214. 1 Rol. 890. 2 Ld. Ray. 1072.

If a judgment be against *two*, the *sci. fa.* must be against both, 2 Salk. 298.

If an *adm. durante minoritate* brings an action and recovers, and then his time determines, the executor may have a *sci. fa.* upon that judgment, Lev. 181. Roll. Abr. 888. 1 Vern. 25.

If plaintiff delay the executing a writ of inquiry till a year after the interlocutory judgment, he cannot do it after without a *sci. fa.* E. 13 W. 3. Bac. Abr. 4 v. 413.

A *sci. fa.* must issue on a judgment on a nonsuit after a year and day. Nonsuit.

If there be two plaintiffs in a personal action, and one of them dies, that shall not put the other to a *sci. fa.* So if one of the defendants die; but there must be a suggestion of the death made on the record. Stat. 8 & 9 W. 3. c. 10. 7 Mod. 68. Salk.

If two plaintiffs, and one dies, no need for *sci. fa.* The like of the defendant.

Salk. 319. *Ld. Ray.* 244. *Carth.* 404. 5 *Mod.* 338.

It is said, if one plaintiff dies after judgment, execution may be sued in the name of both without a *sci. fa.* *Noy* 150. *Show.* 404. *Cart.* 194.

Baron and feme.

If a feme sole be married and have a judgment previous, an execution cannot issue without a *sci. fa.* and making the husband a party, *Salk.* 116. *pl.* 7. *Comb.* 455. So if judgment be above a year old against feme, and she marries, *sci. fa.* must be against her and her husband. *Carth.* 30. *Salk.* 116. 3 *Mod.* 186. *Comb.* 103. *Skin.* 682.

If husband and wife obtain a judgment, and the wife dies, the husband may have a *sci. fa.*; for by the judgment it is become a debt to him without taking admon. *Sid.* 337. 3 *Mod.* 188.

When may or not be sued without Motion.

Sci. fa. sued out of course within seven years; after that, a rule must be had.

The writ of *scire facias*, to revive a judgment after a year and day, may be sued out of course at any time, within seven years after the judgment signed; but after that time, a motion must be made in the treasury for that purpose, without affidavit; draw up rule with the secondary, pay 6s.; there is no occasion to serve it on the defendant.

If ten years, motion must be made in court.

If the judgment be ten years standing, and no execution, then you must give brief to a serjeant, to move for leave to enter it up; fee 10s. 6d.; it is a motion of course, and no affidavit is requisite; draw up rule with secondary, pay 7s. then sue out *sci. fa.* of which the defendant must have notice, if not, no execution is to issue, though there are two *nibils*.

No execution on a *sci. fa.* to revive on an old judgment of 10 years, till *sci. feci* returned.

On motion, the executor of plaintiff had leave to sue out a *scire facias*, to revive a judgment of ten years standing; but execution not to issue (as formerly) on the return of two *nibils*, but either on a return of a *scire feci*, or on affidavit of personal notice to the defendant, that such writ of *sci. fa.* hath been prosecuted according to a precedent settled,

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ted, 6 Geo. 3. between *Tarker & Reynoldson*.
2 *Black. Rep.* 1140. *Bagnell v. Gray*. And in the
King's Bench, on motion to revive of twelve years
standing, court granted a rule to shew cause,
E.T. 1784.

In this court if a *scire facias* goes upon a judg-
ment for debt and damages against the defendant
himself, who was *party* and *privy* to the judgment,
and the sheriff returns *nihil*, and the defendant
makes default, there shall be judgment against him
without awarding a second *scire facias*. *Dyer*,
186. a. 2 *Inst.* 472. *Salk.* 599.

When one *sci.*
fa. only.

But in all cases where the sheriff returns *nihil* on
sci. fa. in the King's Bench, another *scire facias*
shall be awarded. 2 *Inst.* 472. 2 *Mod. Cas.* 227.

King's Bench.

And in this court there must be *fifteen days be-*
tween the teste and return of such a *scire facias*,
which makes it equal to two in the K. B.

Sci. fa. in debt.

Sci. fa. after a year and
day in case.

George the Third, by
the grace of God, of
Great Britain, France,
and Ireland, king, de-
fender of the faith, &c.
To the sheriff of Middle-
sex, greeting: Whereas
John Denn, lately in our
court, to wit, in the
term of *Easter*, in the
second year of our reign,
before * *Alexander Lord*
Loughborough, and his
companions, then our
justices of the Bench at
Westminster, by the con-
sideration of the same
court,

George the Third, by
the grace of God, of
Great Britain, France,
and Ireland, king, de-
fender of the faith, &c.
To the sheriffs of London,
greeting: Whereas *John*
Denn, lately in our court,
to wit, in *Easter* term,
in the 32d year of our
reign, before * *Alexander*
Lord Loughborough, and
his companions, then our
justices of the Bench, at
Westminster, by the con-
sideration of the same
court, recovered against
Richard

Sir James Eyre, Knight, made chief justice, Hilary term
Geo. 3.

court, recovered against *Richard Fenn*, late of *Westminster*, in the said county, hosier, as well a certain debt of 100*l.* as 63*s.* which were adjudged to the said *John Denn*, in our same court for his damages, which he had by occasion of the detaining of that debt, whereof the said *Richard* is convicted, as by the record and proceedings remaining in our same court, before

our justices at *Westminster*, manifestly appeareth yet execution of the said judgment still remaineth to be made, as on the information of the said *John* we have been given to understand; and because we are willing that those things which in our said court are rightly done and transacted, We command you, that by good and lawful men of your bailiwick, you make known to the said *Richard*, that he be before our justices at *Westminster*, on the morrow of *All Souls*, to shew if any thing he hath, or knoweth, to say for himself, whether the said *John* ought not to have execution against him for [the debt and] damages aforesaid, according to the form and effect of the said recovery, it shall seem expedient to him so to do; and have there the names of them, by whom you shall make known to him, and this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

If in debt.

Fifteen days between teste and return.

If in trespass.

If in trespass and assault,

For his damages which he had, by means of certain trespasses committed by the said *Richard*, *Westminster*, in your county.

For his damages which he had, by occasion of certain trespasses and assault, made by the said

Richard Fenn, late of *London*, yeoman, 100*l.* which to the said *John*, in the same court, were adjudged for his damages which he had, by occasion of the not performing certain promises and undertakings made by the said *Richard* to the said *John*, at *London* aforesaid, whereof the said *Richard* is convicted, as (here go on as in the other, only leave the word *debt* out).

Richard on the said John, at London, in your bailiwick.

For his damages which he had by means of a certain breach of covenant, made by the said Richard to the said John, whereof, &c. If in covenant.

This writ is to be ingrossed on a 2s. 6d. stamp parchment, and signed by the prothonotaries, pay 1s. 4d. and 7d. seal. Indorse on it the attorney's name, and place of abode, and the day sued out, "to be returned nihil." Then leave it at the sheriff's office to be returned, pay, if one defendant, 1s.; when it is returnable, call on sheriff for it; give rule at the prothonotaries to appear, pay 2s. 4d. then get a roll of them, and enter same as the precedent below; when the entry is complete, and the four days for appearance is expired, search if defendant has appeared in the prothonotaries book; if no appearance is entered, take the roll with the judgment complete to their clerk, who will sign the judgment, pay 8d. per folio. *N. B.* In the old books it is laid down, that you are to make an entry of the *scire facias* on the remembrance roll, which the prothonotaries keep for that purpose; this is now very rightly dispensed with. File the writ of *sci. fa.* with the *custos brevium*, pay 4d.; you will then be at liberty to take out execution. How sci. fa. to be sued out.

Quashing sci. fa. Plaintiff on motion in the treasury, may quash his own *sci. fa.* without paying costs, though the defendant has appeared; for no costs shall be paid on proceeding by *sci. fa.* till after plea pleaded. Barnes 431. Poole v. Broadfield. Pract. Reg. 378. Henry v. Whitehead. Cooke's Rep. 109. S. C. 8 & 9 W. 3. c. 11. Quashing sci. fa.

Middlesex, to wit. The sheriff was commanded, Whereas John Denn, lately in the court of our lord the king here, to wit, in the term of Easter, in the 32d year of his reign, before Alexander Lord Laugborough, and his companions, then justices of our lord the king of the bench here, to wit, at Entry on the roll of one sci. fa.

Westminster, by the consideration of the same court, recovered against *Richard Fenn*, late of *Westminster*, in the said county, hosier, as well a certain debt of 100*l.* as 63*s.* which were adjudged to the said *John*, in the same court of our lord the king now here, for his damages which he had by occasion of the detaining that debt, whereof the said *Richard* is convicted, as by the record and proceedings thereof, remaining in the same court of our lord the king now here, to wit, at *Westminster* afore said, manifestly appeareth; yet execution of the said judgment still remaineth to be made, and on the information of the said *John*, the king hath been given to understand, and because, &c. that by good, &c. he should make known to the said *Richard*, that he be here at this day, to wit, on the morrow of *All Souls*, to shew if any thing, &c. why the said *John* ought not to have execution against him for the debt and damages afore said, according to the form of the said recovery, &c. And now here at this day came the said *John* by *S. U.* his attorney, and offered himself on the fourth day against the said *Richard*, in the place afore said; and he being solemnly demanded came not; and the sheriff now returneth, that he hath nothing in his bailiwick, whereby he can make known to the king's justices, as by the said writ is commanded, nor is the said *Richard* found in the same: *It is therefore considered*, that the said *John* have execution against the said *Richard*, for the debt and damages afore said, by the default of the said *Richard*, &c.

Judgment.

How if the Judgment be twenty Years old.

How to proceed,
if judgment be
above twenty
years old.

If the judgment be above twenty years old, the court must be moved upon an affidavit of the debt being due, the defendant living, the judgment in full force, and no execution taken out; then fore the affidavit upon an old warrant of attorney as to two particulars, will do, and state, "judgment"

"judgment was recovered in such a term, and no execution having issued," and there must be a *scire feci* returned by the sheriff, or an affidavit made that defendant had notice of the *sci. fa.* before execution sued out, according to the following case :

On a judgment of above twenty years old, the court (according to a precedent said to have been settled above nine years ago) gave leave to the administrator, *cum testamento annexo* of the plaintiff, to sue out a *scire facias* to revive the same, but that no execution should be taken out thereon, until either the sheriff makes an *actual* return of *scire feci*, or an affidavit be made and filed of personal notice being served on the defendant of the issuing such *scire facias*. 2 Black. Rep. 995. *Coyscarne v. Fly*.

On a judgment of above twenty years old, court gave leave to administrator *cum testam.* of plaintiff, to sue out *sci. fa.*

Sci. fa. in debt for an administrator.

George the Third, &c.
To the sheriff of Middlesex, greeting: *Whereas* John Denn, lately in our court, to wit, in the term of *Easter*, in the 32d year of our reign, before Alexander Lord Loughborough, and his companions, then our justices of the Bench at *Westminster*, by the consideration of the same court, recovered against Richard Fenn, late of *Westminster*, in the said county, hosier, as well a certain debt of 40*l.* as 63*s.* which in our said court were adjudged to the said John for his damages, which he had, by occasion of the

Sci. fa. for an executor in case.

George the Third, &c.
To the sheriff of Middlesex, greeting: *Whereas* John Denn, lately in our court, to wit, in the term of *Easter*, in the 32d year of our reign, before Alexander Lord Loughborough, and his companions, then our justices of the Bench at *Westminster*, by the consideration of the same court, recovered against Richard Fenn, late of *Westminster*, in the said county, hosier, 40*l.* which to the said John in the same court were adjudged for his damages, which he had, by occasion of the not performing certain promises

In case of the death of the plaintiff, one *sci. fa.* with nihil returned thereon is sufficient.

the detaining that debt, whereof the said *Richard* is convicted, as by the record and proceedings thereof, remaining in our said court, manifestly appeareth; yet execution of the said judgment still remains to be made; and the said *John* is since dead, as we have received information from *Elizabeth Denn*, administratrix of all and singular the goods and chattels, rights, and credits, which were of the said *John Denn* at the time of his death.

mises and undertakings made by the said *Richard* to the said *John*, at *Westminster* aforesaid, whereof the said *Richard* is convicted, as by the record and proceedings thereof, remaining in our said court, manifestly appears; yet execution of the said judgment still remaineth to be made; and the said *Richard* is since dead, as we have received information from *Elizabeth Denn*, executrix of the last will and testament of *John Denn*, deceased.

And we being willing that those things which in our same court are rightly done and transacted, Command you, that by good and lawful men of your bailiwick, you make known to the said *Richard* that he be before our justices at *Westminster*, on the morrow of *All Souls*, to shew if he hath or knoweth of any thing to say for himself, why the said *Elizabeth* ought not to have execution against him for the debt and damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for her so to do, and have you there the names of them by whom you shall so make known to him, and this write
Witness, Sir *James Eyre* Knight, at *Westminster* the 19th day of *June*, in the 33d year of our reign.

Sci. fa. against an executor
in debt.

George the Third, by
the grace of God, of
Great

The like against an administrator.

George the Third, by
the grace of God, of
Great

Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the sheriff of *Middlesex*, greeting: *Whereas* *John Denn*, lately in our court, to wit, in the term of *Easter*, in the 32d year of our reign, before *Alexander Lord Loughborough*, and his companions, then our justices, &c. (as in the other); yet execution of the said judgment still remaineth to be made; and *whereas* the said *Richard* is since dead, having first duly made his last will and testament, and appointed *Elizabeth Fenn* executrix thereof, as we have been informed in our said court; whereupon the said *John* hath besought us to provide him a proper remedy in this behalf,

Great Britain, France, and Ireland, King, Defender of the Faith, &c. To the sheriff of *Middlesex*, greeting: *Whereas* *John Denn*, lately in our court, to wit, in the term of *Easter*, in the 32d year of our reign, before &c. (to the words manifestly appeareth); yet execution of the said judgment still remaineth to be made; and the said *Richard* is since dead intestate, and administration of all and singular the goods, chattels, and credits, which were of the said *Richard* at the time of his death, was committed, and granted to *Elizabeth Fenn*, widow, and relict of the said *Richard*, in due form of law, as we have received information from the said *John*; whereupon the said *John* hath besought us to provide him a proper remedy in this behalf.

And because we are willing that those things which in our same court are rightly done and transacted, Command you, that by good and lawful men of your bailiwick, you make known to the said *Elizabeth*, that she be before our justices at *Westminster*, on the morrow of *All Souls*, to shew if any thing she has or knows to say for herself, why the said *John* ought not to have his execution against her,

• *debt and*

her, for the *damages aforesaid, to be levied of the goods and chattels which were of the said *Richard* at the time of his death, in her hands to be administered, if she hath so much thereof in her hands to be administered, according to the form of the said recovery, if it shall seem expedient for him so to do; and have there the names of them by whom you shall make known to her, and this writ. *Witness, &c.*

Where defendant is not party there must be two *sci. fa.*'s.

In a *scire facias* upon a judgment in this court, where the defendant is not party to the record, as if it be against an *executor* or *administrator*, there shall not be judgment by default till two *nibils* are returned, *Dy. 168. a.* So if the defendant takes husband after judgment, and the *sci. fa.* is against her husband and her. Unless there be a *scire facias* returned on the first *sci. fa.* and in case there be two *sci. fa.*'s, there need not be fifteen days between the *teste* and return of each; but if there be fifteen days between the *teste* of the first and the return of the second, it will be sufficient, *Cooke's Rep. 114. Price v. Lewis. Pract. Reg. 377. S. C. 2 Black. Rep. 927. Peute v. Watson and others*; and they may be inclusive of both days. And the appearance day of the return of the first, will be the *teste* of the second. *Vide* this case at large, title *Proceedings against Bail*. The second *scire facias* ought not to be sued out, until the appearance day of the return of the first. But it may be done on that day.

Entry of sci. fa. for an administrator on the roll.

Middlesex, to wit. The sheriff was commanded, *Whereas John Denn*, lately in the court of our Lord the King, to wit, in the term of *Easter*, in the 32d year of his reign, before *Alexander Lord Lough-*

The like for an executor.

Middlesex, to wit. The sheriff was commanded, *Whereas John Denn*, lately in the court of our Lord the now King, to wit, in the term of *Easter*, in the 32d year of his reign, before *Alex-*

Loughborough and his companions, then justices of our said Lord the King of the Bench here, to wit, at *Westminster*, by the consideration of the same court, recovered against *Richard Fenn, &c.* (the same as in the first entry of a *sci. fa.*); go to the word (*recovery*), then say, if, &c. And now here at this day came the said *Elizabeth*, by *A. B.* her attorney, and offered herself, on the fourth day, against the said *Richard*, in the plea aforesaid; and the said *Richard* (although solemnly demanded) came not; and the sheriff now returneth, That the said *Richard* hath nothing in his bailiwick, whereby he can make known to him, as by the said writ he is commanded, nor is the said *Richard* found in the same: and upon this the said *Elizabeth* bringeth here into court the letters of administration of the said *John*, by which it sufficiently appears to the court here, that the said *Elizabeth* is administratrix of all and singular the goods, chattels, and credits, of the said

ander Lord *Loughborough* and his companions, then justices of our said Lord the King of the Bench here, to wit, at *Westminster*, by the consideration of the same court, recovered against *Richard Fenn*, to the word (*recovery*); then say, if, &c. And now here at this day came the said *Elizabeth*, by *A. B.* her attorney, and offered herself on the fourth day, against the said *Richard*; and the said *Richard*, being solemnly demanded, came not; and the sheriff now returneth, That the said *Richard* hath nothing in his bailiwick, whereby he can make known to him, as by the said writ he is commanded, nor is the said *Richard* found in the same: and upon this the said *Elizabeth* bringeth here into court the letters testamentary of the said *John*, by which it sufficiently appears to the court here, that the said *Elizabeth* is the executrix of the last will and testament of the said *John Denn* deceased, and hath the administration thereof, &c. And she prayeth execution against the

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said *John*, and hath the administration thereof, &c. And she prayeth execution against the said *Richard* of the debt and damages aforesaid, in form aforesaid, to be adjudged to her, &c. *It is therefore considered*, that the said *Elizabeth*, administratrix as aforesaid, have execution against the said *Richard* for the debt and damages aforesaid, to be levied in form aforesaid, by the default of the said *Richard*, &c.

Entry of two sci. fa.'s against an administratrix on the roll, where they are both of one term.

Middlesex, to wit. The sheriff was commanded, *Whereas John Denn*, lately in the court of our Lord the King, here to wit, in the term of *Easter*, in the 32d year of his reign (as in the last entry, to end of the sheriff's return); then say, *Therefore*, as before, the sheriff was commanded, that by good, &c. he should make known to the said *Elizabeth*, that she should be here at this day, to wit, in fifteen days of *Saint Martin*, to shew in form aforesaid, if, &c. At which day came the said *John*, by his said attorney, and offered himself, on the fourth day, against the said *Elizabeth*; and the said *Elizabeth*, being solemnly demanded, came not; and the sheriff, as before, returneth, that she hath nothing in his bailiwick, where or by which he can give notice to the said *Elizabeth*, as by the said writ he is commanded; nor is the said *Elizabeth* found in the same; and upon this the said *John* prays execution against the said *Elizabeth* of the debt and damages aforesaid, to be levied of the goods and chattels which were of the said *Richard*.

Richard, at the time of his death, in her hands to be administered, if she hath so much thereof in her hands to be administered. *It is therefore considered*, That the said *John* have execution against the said *Elizabeth*, administratrix as aforesaid of the goods and chattels which were of the said *Richard* at the time of his death, in the hands of the said *Elizabeth*, to be administered, if she hath so much thereof in her hands, &c. by the default of the said *Elizabeth*, &c.

N. B. This will serve against an executor.

How to enter two sci. fa.'s of different Terms.

If there be two *sci. fa.*'s sued out, as in the latter case, viz. against an executor or administrator, and they be returnable in different terms, then enter on the roll the first *sci. fa.* as of the term that is returnable, with an award of the second, in the same manner as the last entry, to the day of the return of the second; then enter on another roll of the term the alias is returnable, thus:

If there be two *sci. fa.*'s of different terms, how to enter.

Middlesex, to wit. Heretofore, as it appeareth, of *Trinity* term last past, on the 598th roll, it is thus contained: *Middlesex*, to wit; The sheriff was commanded (to the end of the first *sci. fa.* return, and award of the second), then go on thus: at which day the said *John*, by *A. B.* his attorney, cometh and offereth himself, on the fourth day, against the said *Elizabeth*, in the plea aforesaid; and the said *Elizabeth*, although solemnly called, came not; And the sheriff now returneth, that the said *Elizabeth* hath not any thing in his bailiwick, where or by which he can give her notice, as by the said writ he is commanded; nor is the said *Elizabeth* found in the same: and thereupon the said *John* prayeth execution against the said *Elizabeth*, of the debt and damages aforesaid, to be levied, &c. (as in the last entry exactly).

Entry on the second *sci. fa.* roll.

Of

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Of the Appearance.

If the defendant appears, he does it with the prothonotaries, by making a *præcipe* thus: *Middlesex* appearance for *Richard Fenn* ats. *John Denn* to a *sci. fa.* (or an alias *sci. fa.*) returnable on the morrow of *All Souls*. A memorandum on a 2s. 6d. stamp is necessary to be filed.

Then the plaintiff is in a condition to declare which he will do in this form.

Middlesex, (ff.) It was commanded to the sheriff, that *whereas* (to the end of the entry on the roll as far as the appearance of the defendant); then say, And the said *Richard* at that day, being solemnly called, comes by *J. K.* his attorney, and the said *John* prays that execution may be adjudged to him of the debt and damages aforesaid according to the force, form, and effect, of the said recovery, &c.

If the *sci. fa.* be for executors, &c. then you put the profert of the letters testamentary, &c. at the end of the declaration.

Declaration.

A declaration on a *sci. fa.* returnable the last return of a term, may be intitled generally of the same term, 3 *Wils.* 154.

You charge 8d. *per folio* for the declaration, besides duty.

Error.

A *sci. fa.* is a personal action, and therefore, after verdict, the defendant must put in bail in error. *Pulteney v. Townson.* 2 *Black. Rep.* 1227.

Of the Proceedings by an Executor or Administrator, after an Interlocutory Judgment obtained.

Proceedings by an executor or administrator after interlocutory judgment.

At common law, the death of either party abated the suit; but now by *stat. 8 & 9 W. 3. c. 10. s. 6.* it is enacted, That if any plaintiff happen to die after interlocutory judgment, and before final judgment obtained, the said action shall not abate by reason thereof, if such action might originally be prosecuted or maintained by the executors or administrators of such plaintiff. And if the defendant

defendant die after such interlocutory judgment, and before final judgment therein obtained, the said action shall not abate, if such action might originally be prosecuted or maintained against the executors or administrators of such defendant: and the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against such defendant, if living, after such interlocutory judgment, or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them: and if such defendant, his executors or administrators, shall appear at the return of such writ, and not shew or alledge any matter sufficient to arrest the final judgment; or being returned warned, or upon two writs of *scire facias* it be returned, that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, should make default, that thereupon a writ of inquiry of damages shall be awarded; which being executed and returned, judgment final shall be given for the plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias* against such defendant, his executors or administrators respectively.

If the plaintiff dies after interlocutory judgment signed, and before inquiry, make out the following *sci. fa.* in the county where the action is laid, and also an *alias* against his executors, if any, or his administrator; which is to be signed by the prothonotaries, sealed and entered as before.

If plaintiff dies after interlocutory judgment.

George the Third, &c. To the sheriffs of London, greeting: *Whereas John Denn*, lately in our court, to wit, in *Hilary* term, in the 33d year of our reign before *Alexander Lord Loughborough* and his companions, then our justices of the Bench, at *Westminster*, by our writ, impleaded *Richard Fenn*, late of, &c. merchant, declaring in the same plea against

Sci. fa. where the plaintiff died after interlocutory judgment, and before final judgment.

against him, *For that whereas* (here set forth the whole declaration), and therefore he brought suit, &c. And such were the proceedings in our same court, that afterwards, to wit, in *Trinity* term last past, it was considered by the said court, that the said *John* ought to have recovered his damages by occasion of the premises: but because it was unknown what damages the said *John* had sustained by means of the premises aforesaid; it was commanded to the then sheriffs of *London*, that by the oath of twelve good and lawful men of their bailiwick, they should diligently inquire what damages the said *John* had sustained, as well by occasion of the premises, as for his costs and charges by him laid out about his suit in that behalf; and that they should send the inquisition, which they should thereupon take, to our justices at *Westminster*, in three weeks of the *Holy Trinity*, under their seal, and the seals of those by whose oath they should take that inquisition, as by the record and proceeding thereupon now in our same court, at *Westminster* aforesaid, appears; yet inquisition of the said damages still remains to be made; and the said *John*, after interlocutory judgment had been given in form aforesaid, and before the return of the said writ of inquiry, by us to the said sheriffs sent, as aforesaid, for the purpose aforesaid, died *, having first duly made his last will and testament in writing, and appointed *Richard Sims* sole executor thereof; upon whose death the said *Richard* duly proved the said will in the prerogative court of *Canterbury*, in due form of law, and took upon himself the burthen of the execution thereof, as by the letters testamentary thereof produced here in court to our justices, by the said *Richard Sims*, fully appear: and because we being willing that those things which in our same court be rightly done and transacted, We command you, that by good and lawful men of your bailiwick, you make known to the said *Richard Fenn*, that he be before our justices at *Westminster*, on the morrow of *All Souls*, to shew

* Intestate, and administration of all and singular the goods, chattels, rights, and credits, which were of the said *John* at the time of his death, was by *Thomas*, by divine Providence archbishop of *Canterbury*, primate of all *England*, and metropolitan, committed and granted to *Richard Sims*; to wit, at *Westminster*

if he has, or knows of any thing to say for himself, why the damages in the said action should not be assessed to the said *Richard Sims*, executor as aforesaid, according to the form of the statute in such case made and provided, if it shall seem expedient for him so to do; and further to do and receive what our said court shall then and there consider of him in this behalf; and have you there the names of them by whom you shall so make known to him, and this writ. Witness, Sir *James Eyre* Knight, at *Westminster*, &c.

aforesaid, as by the letters of administration thereof produced, &c.

If a *nihil* be returned according to the above statute, an *alias sci. fa.* must issue; give a rule as before.

If a *nihil* on the first, an *alias*.

Upon the entry of the first *sci. fa.* on the roll, you award the second as far as the return, in the same manner as in p. 522. provided they be of different terms, if not, one roll is sufficient; and after the award of the second *sci. fa.* and sheriffs return thereon, say, And hereupon the said *Richard Sims*, executor, as aforesaid, prayeth, That the damages aforesaid, by the said *John* in his life-time sustained, on occasion of the premises aforesaid, may be assessed and adjudged unto him; Therefore it is considered, that the damages aforesaid, by him the said *John* in his life-time sustained, on occasion of the premises aforesaid, be assessed and adjudged to the said *Richard Sims*, executor as aforesaid, according to the form of the statute in such case made and provided, by the default of the said *Richard*, &c. And because it is still unknown what damages the said *John* hath sustained by occasion of the said premises, therefore, as before, the sheriffs are commanded, that by the oath of twelve good and lawful men of their bailiwick, they diligently inquire, what damages the said *John* hath sustained, as well by reason of the premises, as for his costs and charges by him laid out about his suit in that behalf; and the inquisition which they shall thereupon take, make appear to our

Entry.

Judgment of the court and award of a new inquiry.

The further entry.

our justices at *Westminster*, in, &c. under their seal, and the seals of those, by whose oath they shall take the said inquisition, &c. (the clerk of the judgments enters the final judgment hereon, after the costs are taxed).

If no appearance,
sign judgment.

If the defendant does *not appear* to the second *sci. fa.* after the rule is expired, sign judgment with the prothonotaries, as in the case of other *sci. fa.*'s; give notice of executing a writ of inquiry, and proceed to final judgment as in other common cases.

Appearance.

But if the defendant appears, then he enters it as before with the prothonotaries, and pays 3*s.* 10*d.*; a memorandum or minute on a 2*s.* 6*d.* stamp is to be left; therefore, before judgment is signed, search for appearance in the prothonotaries book, no costs if no plea, 8 & 9 *W.* 3. c. 10.

Declaration.

London, (ff.) It was commanded to the sheriff, *Whereas*, (to the end of the entry on the second roll, as far as the sheriff's return on the *alias*, then say,) and the said *Richard* at that day being solemnly called, comes by *S. U.* his attorney; and thereupon the said *Richard Sims*, executor as aforesaid, prays that the damages in the said action may be assessed, and recovered by him the said *Richard Sims*, according to the form of the statute in that case made and provided, &c.; add profert in curia of the letters testamentary.

If defendant dies
after inquiry ex-
ecuted, and be-
fore return.

If a defendant dies after a writ of inquiry executed, and *before the return thereof*, it is within the act: and the *sci. fa.* against his executor or administrator must be "*to shew cause why the damages assessed should not be recovered.*" 1 *Will.* 243. 1 *Salk.* 115. *Lill. Entr.* 647.

Sci. fa. against
an administrator
of a defendant
after an interlo-
cutory judg-
ment, and before
inquiry.

George the Third, &c. To the sheriff of *Middlesex*, greeting: *Whereas John Denn*, lately in our court, to wit, in *Easter term*, in the 33d year of our reign, before Sir *James Eyre*, Knight, and his companions, then our justices of the Bench, im-
pleaded

pleaded *Richard Fenn*, late of, &c. declaring in the same plea against him, *For that whereas* (here set forth the whole declaration); and therefore he brought suit, &c. and such proceedings were thereupon had in our same court, that afterwards, to wit, in *Trinity* term last past, it was considered by the said court, that the said *John* ought to recover his damages, by occasion of the premises; but because it was unknown to our same court, what damages the said *John* had sustained by occasion of the premises aforesaid, it was commanded, to the then sheriff, That by the oath of twelve good and lawful men of his bailiwick, he diligently inquire what damages the said *John* had sustained, as well by occasion of the premises, as for his costs and charges by him about his suit in that behalf expended; and that he should send the inquisition which he should thereupon take, to our justices at *Westminster*, on _____, under his seal, and the seals of those by whose oath he should take that inquisition, as by the record and proceedings thereupon, now remaining in our same court of the Bench aforesaid, appears; yet inquisition of the said damages still remains to be made; and the said *Richard*, after interlocutory judgment had been given in form aforesaid, and before any inquisition taken on our said writ of inquiry by us to you sent, for the purpose aforesaid, died intestate, and administration of all and singular the goods, chattels, and credits, of the said *Richard*, have been granted to *Mary Fenn*, the widow and executrix of the said *Richard*, as we have been given to understand and be informed; and because we are willing that those things which in our same court are rightly done and transacted, command you, that by good and lawful men of your bailiwick, you make known to the said *Mary Fenn*, administratrix as aforesaid, that she be before our justices at *Westminster*, on the morrow of *All Souls*, to shew if she has or knows of any thing to say for herself,

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Rebbiting Judgments.

herself, why the damages in the said action ought not to be assessed, and to be recovered by the said *John* according to the form of the statute in such case made and provided, if it shall seem expedient for him so to do, and further to do and receive what our same court shall then and there consider of him in this behalf; and have you there the names of them by whom you shall so make known to her, and this writ. Witness, Sir *James Eyre* Knight, at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

Proceedings against Bail.

THE bail stipulate by their recognizance in this triple alternative, that the defendant shall, if condemned in the action, satisfy the plaintiff his debt with the costs, or that he shall surrender himself a prisoner; or that they will pay it for him: and when judgment is obtained, they stand liable to perform his contract, and may be compellable so to do; but before any immediate proceeding can be had against them, *either by action of debt, on the recognizance, or by scire facias*, whereby they are commanded to shew cause why the plaintiff should not have execution against them for the debt and damages recovered, a *capias ad satisfaciendum* must be sued out against the defendant, *directed to, and left with the sheriff of the county where the action was first laid, for a return of non est inventus in his office, four days exclusive of the return, Barnes 64. Merrit v. Montfort. Cooke's Rep. 34. Laycock v. Arthur.* The bail not being bound to render the principal, until they know what execution the plaintiff chuses to take out, and such a *capias ad satisfaciendum* where the proceedings are *by original*, vide p. 120, *should have fifteen days between the teste and return. Ibid. 76. Wals v. Cornett.* The *stat. 13 Car. 2. c. 2.* is express to this point.

Ca. fa. to be
sued out.
Hob. 196.

Of Surrender before justifying. Vide p. 184, 185, 186, 187.

Both courts now hold that bail may surrender their principal without a justification even pending a rule to bring in the body, 1 *H. Black. Rep.* 638. *Hall v. Walker.* Vide 5 *Term Rep.* 368. So after exception, *E. 11 Geo. 3. C. B.* But a surrender after an assignment of bail-bond taken is void before justification of the bail. So if bail attempt to

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justify,

justify, and are *rejected*, they cannot render, because they are deemed as no bail. Bail surreptitiously put in are as no bail, and cannot surrender. 2 *Black. Rep.* 1179. Case at large, p. 186.

No execution but a *capias ad satisfaciendum* has effect to fix the bail, all the others aiming at satisfaction by a seizure of the defendant's property, whereas this writ amounts to a demand on him to surrender himself a prisoner, which if not done on the *appearance day* of the *return thereof* (where the proceedings are by *capias*), the bail (who may on their own authority take the defendant into custody, and by surrendering him discharge themselves) having, it is presumed, made their election to perform the condition of their recognizance.

To enter recognizance on a roll.

The recognizance being thus forfeited, the plaintiff may either bring his *action of debt on the recognizance*, or proceed by *scire facias against the bail*: but before a *scire facias* is sued out, or action commenced, apply to the filazer to enter the recognizance on a roll, and docquet the same. The practice of late has been to proceed before the entry; and if the recognizance be entered before replication of *nul tiel* record, it will be sufficient. The safest way will be to get the filazer to make the entry before the *scire facias* sued out.

After *ca. sa.* lodged, defendant brought error; after it was spent, plaintiff got it returned and proceeded; held irregular.

A *ca. sa.* was lodged with the sheriff for a return of *non est inventus*, in order to proceed against the bail. Afterwards defendant brought error, and after it was spent, plaintiff got the *ca. sa.* returned and proceeded against the bail, which proceeding was discharged: the court holding, that the *ca. sa.* being returnable, at a time when the writ of error was depending, was not a regular foundation for proceeding against the bail. *Derisley v. Deland Barnes* 83.

Allowance of a writ of error in a judgment by nil dicit is a super-seedeas as to a subsequent writ

Final judgment was signed in Hilary term 1777 21st February, 1777, costs taxed, and allowance of a writ of error was served; notwithstanding which though a rule to transcribe was served, and transcript money paid, plaintiff's attorney sued out

ca. sa. tested 12th February, returnable fifteen days of Easter, and left it for a return of *non est inventus*, which was returned. Two *sci. fa.*'s were sued out, and returned *nihil*, and judgment was signed 22d June, being four days after the end of Trinity term, and on 25th sued a *fi. fa.* against the bail. Motion to set *ca. sa. sci. fa.*'s and all the proceedings aside with costs, Court held, that in the clandestine way in which *sci. fa.*'s are usually sued out and returned, it would be unjust to require the bail to plead this matter, to a suit of which they have in fact no notice; and that therefore the irregularity may be taken advantage of upon motion. They also held, that (upon the merits) the allowance of the writ of error was a superseas to the writ of execution, and to all the subsequent proceedings founded thereupon, and made the rule absolute. *Dudley v. Stokes*, 2 Black. Rep. 1183. Vide 1 Wils. 16. *Smith v. Nicholson*. Where a *ca. sa.* was left 3d December, and error allowed and served on the 4th, Court held it a superseas. 2 Str. 1186. 867. 6 Mod. 130. Salk. 321. 2 Roll. Abr. 490.

of execution, and proceeding against the bail set aside.

How to proceed by Action.

Having got the *ca. sa.* returned, you may sue out a *capias* against the bail, in which is to be inserted the following clause of *ac-etiam*: "And also that the said Richard and Thomas answer the said John in a plea of debt upon recognizance, according to the custom of our court of common bench."

If this clause was not inserted, it would be a surprise on the bail, who, not knowing the cause of action, may let slip the time allowed them to surrender the defendant, and thereby discharge themselves. The bail cannot be arrested, be the amount of the debt what it may. *Crompt. 31. Tidd 34.*

The costs of the action must be paid, although the bail surrender within the time so determined in the King's Bench, 5 Term Rep. 363. *Perrigall v. Mallish.*

Costs.

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I do not find any determination to say that you may proceed in any other manner than by *capias*, that is, whether you can proceed by original *quare clausum fregit*, because that writ gives no notice to the bail of its being an *action on the recognizance*, which it seems is the intent of the *ac etiam*.

Writ to be served four days before the return.

This writ must be served at least *four days before the return*, for defendant ought to have as much advantage on an action, as upon a *scire facias*. *Flanagan v. Adey, Pract. Reg. 83. Barnes 62. Main v. Price. Wright v. Dixon. Cooke's Rep. 18.*

The bail in this court are liable to the extent of their recognizance. *Calverag v. De Miranda, Barnes 76.* So they are to the whole extent of the penalty of the bond, *1 H. Black. Rep. 76. Mitchell v. Gibbons.*

How to proceed by Scire Facias.

Where to issue *sci. fa.*

It is held, that a *scire facias* against bail may be in *Middlesex*, (the record of the recognizance being at *Westminster*,) or in the county where the caption of the recognizance appears to be on record, if in any other county except *Middlesex*. *Pickering v. Thomson, bail of Miller. Barnes 207.*

Sci. fa. on recogn. of bail in London may be either there or in *Middlesex*.

A motion to set aside a *sci. fa.* against bail in *London*, upon a recognizance taken in *Serjeant's Inn*, in *Fleet-street*, and recorded at *Westminster*; the court were of opinion, that the *scire facias* might issue either into *London* or *Middlesex*. *Cock v. Green. Cooke's Rep. 31. Contra K. B.*; there the entry is *coram domino rege apud Westminster*, and therefore must be in *Middlesex* only, *Salk. 564. 600. 609.*

Sci. fa. on recogn. in London may be sued there, though the bail be enrolled in *Middlesex*.

A *scire facias* was sued in *London*, the recognizance was taken at *Serjeant's Inn, Chancery lane, London*, before the Ch. J. Motion to set aside the proceedings for irregularity, the caption of the recognizance being in *Middlesex*; for being taken before the C. J. generally, it shall be understood to be before him and his brethren at *Westminster*. *Hob. 195. Hall v. Wicklesfield cited.*

Debt

Debt on recognizance taken before the C. J. *Serjeant's Inn, London.* The question was, whether the recognizance must be considered as entered into where it is taken, or at *Westminster*, where it is enrolled. *The court held*, the declaration was right, because the inrollment expressed it to be taken in *London*. But if the entry of the record be general, that it was taken before the chief justice (without expressing where), it shall be understood to be taken in court; and the *venue* shall be in *Middlesex*, *Leigh* shewed for cause, that where the bail is inrolled as taken in *Middlesex*, there the *sci. fa.* must be brought in *Middlesex only*; but where, as taken in any other county, either that in which it is taken, or in which it is inrolled. And this was allowed by the court to be the true rule. And on inspecting the record, it appeared that on 28th May 1780, the bail was inrolled, as taken the 11th of May preceding, before Sir J. E. Wilmot, at *Serjeant's Inn, in Chancery-lane, London.* Rule discharged with costs. *Kerry v. Thornton.* 2 *Black. Rep.* 768.

The filacer, upon being spoke to, will enter up the recognizance of bail, and docket the roll as before; pay 4 s. After the *ca. fa.* is returned by the sheriff, he will also make out the first *sci. fa.* (though for expedition you may make out same yourself); ingross it on a 2 s. 6 d. stamp parchment, pay him signing 8 d. per sheet, seal 7 d. and if you mean to give notice to the bail, take it to the sheriff's office, and get a summons thereon to your officer, pay 2 s. 4 d. officer for summoning, 5 s. each bail; when returnable, call on sheriff for same; and if he returns a *sci. feci* thereon, give a rule on the appearance day of the return at prothonotaries for the defendants to appear, pay 2 s; the clerk will at the same time give you a roll to enter the *sci. fa.* and judgment thereon complete, which being done, and the rule expired, if no appearance entered with the prothonotaries,

How to proceed
by *sci. fa.*

the clerk will sign judgment; pay him 8d. per sheet; file the writ with the *custos brevium*, pay 4d. and then you may take out execution.

But if bail are not to be warned,

But if you do not chuse to give the bail notice, then the first *sci. fa.* is to be left at the sheriff's office to be returned *nihil*; which being returned on the appearance day of the return, sue out an *alias* yourself, which is an exact copy of the first (except the words being added) "*as before we have commanded you*;" the *teste* of it is to be on the appearance day of the return of the first, which is to be signed by the prothonotaries, pay 2s. seal 7d.; leave it at the sheriff's office as before, to be returned *nihil* four days previous to the return, pay 2s. *Cooke's Rep.* 34. And note, There need not be fifteen days between the *teste* and return of each *sci. fa.* but only fifteen days between the *teste* of the first and return of the second, as will appear by the following case:

There need not be fifteen days between the *teste* and return of each.

Sci. fa. against bail, plea in abatement that there are not fifteen days between the *teste* and return of each of the *sci. fa.*'s; on demurrer, judgment for the plaintiff, that the defendants answer over, for there need not be fifteen days between the *teste* and return of each of the *sci. fa.*'s, but only fifteen days between the first *sci. fa.* and the return of the second *sci. fa.* *Cooke's Rep.* 114. *Price v. Lewis and others.* *Lutwich* 24. *Pract. Reg.* 377. S. C.

How to proceed after return.

When returnable, get it from the sheriff, and give rule on the appearance day of the return at the prothonotaries for the defendants to appear, pay 2s. The clerk will give you a roll to enter them thereon, and judgment by default must also be entered; the rule expires in four days, and no appearance being entered, (which must be with the prothonotaries,) the clerk enters or signs the judgment.

If two *sci. fa.*'s of different terms, how to proceed.

If there be two *sci. fa.*'s, and returnable of different terms, you must obtain two rolls, the one of term the first *sci. fa.* is returnable, and the other of the term in which the second is returnable; you

you enter on the *first* roll the *first sci. fa.* with an award only of the *second*, as far as the *return day*, which docket of the term the first is returnable.

The second *sci. fa.* is to be entered on the *second* roll, being a recital only of the first *sci. fa.* and return, as also an award of the second *sci. fa.* and return, then add the judgment of the court on the default of appearance. *Vide* the entry further on.

Second sci. fa.

If a *scire feci* be returned on the first *scire facias*, it must lie *four days* in the *sheriff's office* (exclusive of the return day), and so must the *alias sci. fa.* (although a *nihil* be returned). This is the practice, and so is the practice in the K. B.

How long to lie in sheriff's office.

Entry of recognizance of bail in debt.

The like in case.

Middlesex, (ff.) The sheriff was commanded, that he should take *John Fell*, late of *London*, vintner, if he should be found in his bailiwick, and him safely keep, so that he should have his body before the justices of the Lord the King at *Westminster*, on the morrow of the *Holy Trinity*, to answer *William Read*, in a plea, wherefore, with force and arms the close of the said *William*, at *Westminster*, he broke, &c. and other wrongs, &c. to the great damage, &c. and against the peace, &c.; and also in a certain plea of debt upon demand for 145*l.* Afterwards, to wit, on the 4th

Middlesex, (ff.) The sheriff was commanded, that he should take *Thomas Lee*, late of *Westminster*, in the said county, smith, if he should be found in his bailiwick, and him safely keep, so that he might have his body before the justices of the lord the king at *Westminster*, on the morrow of *Holy Trinity*, to answer to *Henry Bridges*, in a plea, wherefore, with force and arms the close of the said *Henry* at *Westminster*, he broke, and other wrongs, &c. to the great damage, &c. and against the peace, &c.; and also in a certain plea of trespass, on the case, upon promises, to

4th day of *June*, in this sameterm, *Edward Legg*, of *Lothbury, London*, hofier, and *Thomas Flemming*, of the same place, plaisterer, came personally before Sir *James Eyre*, Knight, and his companions, justices of the Lord the King of the Bench here, and acknowledged themselves, and each of them did acknowledge himself to owe to the said *William Read* the sum of 90*l.*; which said sum of 90*l.* they, the said *Edward Legg* and *Thomas Flemming*, for themselves and their heirs, have consented and granted, and each of them for himself and his heirs, hath consented and granted, shall be made of their and each of their lands and chattels, and to the use and behoof of the said *William Read*, be levied, ("and also at the same time the said *John Fell* came personally before the same justices, and acknowledged to owe to the said *William* the sum of 180*l.*; which said sum of 180*l.* he the said *John*, for himself and his heirs, willed " and

to the damage of the said *Henry* of 103*l.** And now here on this day comes *Thomas Lime*, of the *Strand*, in the county of *Middlesex*, hofier, and *Richard Frame*, of the same place, ironmonger, in their proper persons, before Sir *James Eyre*, Knight, and his companions, justices of the Bench here; and acknowledge, and each of them acknowledgeth, that they owe to the said *Henry* the sum of 102*l.* 17*s.*; which said sum of 102*l.* 17*s.* the said *Thomas Lime* and *Richard Frame*, for themselves, and their heirs, have consented and granted, and each of them, for himself and his heirs, hath consented and granted, shall be made of their and each of their lands and chattels, &c. and to the use and behoof of the said *Henry*, be levied ("and also at the same time the said *Thomas Lee* came personally before the same justices, and acknowledged to owe to the said *Henry* the sum of which said sum of the said *Thomas Lee*,

If the defendant be present, add this, not otherwise.

* Either the day may be stated, or as this is stated.

“ and granted should be
 “ made of his lands and
 “ chattels, and to the
 “ use and behoof of the
 “ said *William Read* be
 “ levied).” Upon con-
 dition, that if judgment
 shall happen in the same
 court here, in the said
 plea, to be given for the
 said *William* against the
 said *John*; then the said
John shall satisfy the
 debt aforesaid, and all
 such damages which shall
 be adjudged unto the
 said *William* against the
 said *John*, in the same
 court here, in the plea
 aforesaid, or shall render
 his body on that occa-
 sion to the prison of the
Fleet, &c.

“ *Lee*, for himself and
 “ his heirs, willed and
 “ granted should be
 “ made of his lands and
 “ chattels, and to the
 “ use of the said *Henry*
 “ be levied).” Upon this
 condition, that if judg-
 ment shall happen in the
 same court here, in the
 said plea, to be given for
 the said *Henry* against
 the said *Thomas*, then the
 said *Thomas* shall satisfy
 all such damages which
 shall be adjudged to the
 said *Henry* against the
 said *Thomas*, in the same
 court here, in the plea
 aforesaid, or shall ren-
 der his body on that oc-
 casion to the prison of
 the *Fleet*, &c.

Sci. fa. in debt upon re-
 cognizance against the
 bail and principal.

The like in case against
 the bail only.

George the Third, &c.
 To the Sheriff of *Mid-*
dlesex, greeting: *Where-*
as *Edward Legg*, of
Lutbury, *London*, hosier,
 and *Thomas Flemming*, of
 the same place, plaif-
 terer, lately in our court,
 (to wit,) in the term of
 the *Holy Trinity* in the
 33d year of our reign,
 came before Sir *James*
Eyre, Knight, and his
 companions, our justices
 of

George the Third, &c.
 To the Sheriff of *Mid-*
dlesex, greeting: *Whereas*
Thomas Lime, of the
Strand, in the county of
Middlesex, hosier, and
Richard Frame, of the
 same place, ironmonger,
 lately in our court, to
 wit, in the term of the
Holy Trinity in the 33d
 year of our reign, came
 before Sir *James Eyre*,
 Knight, and his compa-
 nions,

These writs are
 not amendable,
 as the bail might
 be deprived of
 the advantage of
 surrender.
Barn. 26.

of the Bench, at *Westminster*, in their proper persons, and acknowledged themselves, and each of them did acknowledge himself, to owe to *William Read* the sum of 90*l.*; which said sum of 90*l.* they the said *Edward Legg* and *Thomas Flemming*, for themselves and their heirs, consented and granted, and each of them for himself and his heirs did consent and grant, should be made of their and each of their lands and chattels, and to the use and behoof of the said *William Read* be levied; And whereas, *John Fell*, late of *London*, vintner, lately, that is to say, in the term of the Holy Trinity, in the 33*d* year of our reign, came before *Sir James Eyre*, Knight, and his companions, our justices of the Bench at *Westminster*, and acknowledged himself to owe to the said *William Read*, the sum of 180*l.*; which said 180*l.* be the said *John Fell*, for himself and his heirs, consented should be made of his lands and chattels, and to the use and behoof of the said *William Read*, be levied;

If principal be joined.

Upon

nions, our justices of the Bench, at *Westminster*, in their proper persons, and acknowledged, and each of them acknowledged to owe to *Henry Bridges*, the sum of 102*l.* 17*s.*; which said sum of 102*l.* 17*s.* the said *Thomas Lime* and *Richard Frame*, for themselves and their heirs, had consented and granted, and each of them, for himself and his heirs, had consented and granted, should be made of their and each of their lands and chattels, and to the use and behoof of the said *Henry* be levied; Upon this condition, that if judgment should happen in our court of the Bench aforesaid, in a certain plea of trespass on the case, upon promises, to the damage of the said *Henry* of 150*l.* to be given for the said *Henry*, against *Thomas Lee*, late of *Westminster* in the said county, smith, then the said *Thomas* should satisfy all such damages which should be adjudged to the said *Henry*, against the said *Thomas*, in our same court, in the plea aforesaid, or should render his body on that occasion to the

Upon this condition, that if judgment should happen in our court of the Bench aforesaid, in a certain plea of debt upon demand, for 145 *l.* to be given for the said *William*, against the said *John Fell*, by the said *William Read*, in our court prosecuted, then the said *John* should satisfy the debt aforesaid, and all such damages as should be adjudged unto the said *William* against the said *John*, in our same court here, or should render his body on that occasion to the prison of the *Fleet*: and although the said *William* afterwards, to wit, in that same term, before Sir *James Eyre*, Knight, and his companions, our justices of the Bench at *Westminster*, by the consideration of the same court, recovered against the said *John* in the said plea, the aforesaid debt of 145 *l.* and also 7 *l.* 10 *s.* which in our said court were adjudged to the said *William*, for his damages which he had sustained by reason of the detaining that debt whereof the said *John* is convicted, as by the record and process thereof now remaining in our same court manifestly appeareth. Nevertheless, the said *John* the debt and damages aforesaid to the said *William* hath not satisfied,

the prison of the *Fleet*: and although the said *Henry*, afterwards, to wit, in the said term, in the 33d year aforesaid, before Sir *James Eyre*, Knight, and his companions, our justices of the Bench at *Westminster*, by the consideration of the same court, recovered against the said *Thomas Lee*, in the said plea, 100 *l.* which in our said court were adjudged to the said *Thomas*, for his damages which he had sustained, by reason of the not performing certain promises and undertakings made by the said *Thomas* to the said *Henry*, whereof the said *Thomas* is convicted, as by the record and process thereof now remaining in our same court manifestly appeareth. Nevertheless, the said *Thomas* the damages aforesaid hath not satisfied, nor his body, on the occasion aforesaid, to the said prison of the *Fleet* rendered, &c. as in the other.

Put the debt and costs together.

tified, nor his body, on the occasion aforesaid, to the prison of the *Fleet* rendered, according to the form of the recognizance aforesaid, as on the information of the said *William* we are given to understand: and because we are willing that those things which in our same court are rightly done and recognized, should be duly carried into execution, we command you, that by honest and lawful men, of your bailiwick, you make known to the said *Edward, Thomas, and John*, that they be before our justices at *Westminster*, on the morrow of *All Souls*, to shew if they have or know any thing to say for themselves (that is to say), the said *Edward*, why the said 90*l.* by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use of the said *William* be levied; and the said *Thomas*, why the said 90*l.* by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use and behoof of the said *William* be levied, (and the said *John*, why the said 180*l.* should not be made of his lands and chattels, and to the use and behoof of the said *William* be levied,) according to the force, form, and effect of the said recognizance, if to him it shall seem expedient: and have you there the names of those by whom you shall make known to them, and this writ. *Witness, &c.*

If principal be joined.

Who to make out the first *sci. fa.*

That filacer by whom the bail-piece is filed, and who enters the record of the recognizance on his roll, makes out the first *sci. fa.* into *Middlesex*, or other proper county, as the case requires; the second *sci. fa.* (when necessary) is signed by the prothonotary. *Follit v. Trill and another.* Barn. 97. So reported to the court.

Teste of *sci. fa.*

The *sci. fa.* must not be *tested* before the appearance day of the return of *ca. fa.*; nor must the *ca. fa.* be *tested* before the term final judgment is signed of, but may be on the first day of that term.

Alias.

If there be an *alias*, then the *teste* must be on the appearance day of the return of the first *sci. fa.*

Entry of one *sci. fa.* against the

Middlesex, (to wit.) The sheriff was commanded, whereas *Thomas Legg*, of, &c. and *Thomas Fleming*,

ming, of, &c. lately in the court of our Lord the King, to wit, in the term of the *Holy Trinity*, in the 33d year of his reign, came before Sir *James Eyre*, Knight, and his companions, then our said Lord the King's justices of the Bench, at *Westminster*, in their proper persons, and acknowledged, and each of them acknowledged, to owe to *William Read* the sum of 90*l.* which said sum of 90*l.* they the said *Edward Legge* and *Thomas Flemming*, for themselves and their heirs, consented and granted, and each of them for himself and his heirs did consent and grant, should be made of their and each of their lands and chattels, and to the use and behoof of the said *William Read* be levied: (*And also the said Sheriff was commanded: Whereas John Fell, late of, &c. lately in the court of our lord the king, to wit, in the said Trinity term, in the 33d year of his reign, came before Sir James Eyre, Knight, and his companions, then our said lord the king's justices of the bench at Westminster, in their proper persons, and acknowledged himself to owe to the said William Read the sum of 180*l.*; which said 180*l.* he the said John Fell, for himself and his heirs, consented should be made of his lands and chattels, and to the use and behoof of the said William Read, be levied:)* Upon this condition, that if judgment should happen in the same court of the Bench aforesaid, in a certain plea of debt upon demand for 145*l.* to be given for the said *William* against (the said) *John Fell*, late of *London*, vintner, by the said *William*, in the same court prosecuted, then the said *John* should satisfy the debt aforesaid, and all such damages as should be adjudged unto the said *William* against the said *John*, in the same court here, or should render his body on that occasion to the prison of our said Lord the King of the *Fleet**: and although the said *William*, afterwards, to wit, in that same term, before Sir *James Eyre* Knight, and his companions, then our said Lord the King's justices of the Bench at *Westminster*, by the consideration of the same court, recovered against the said

bail, and judgment thereon in debt.

The prothon. now dispense with the entry on the remembrance roll.

If against the principal.

* If the sci. fa. be against the defendant, here take his acknowledgment in.

John, in the said plea, the aforesaid debt of 145*l.* and also 7*l.* 10*s.* which in the same court were adjudged to the said *William* for his damages which he had sustained by reason of the detaining that debt, whereof the said *John* is convicted, as by the record and process thereof, now remaining in the same court, manifestly appeareth. *Nevertheless*, the said *John* the debt and damages aforesaid to the said *William* hath not satisfied, nor his body on the occasion aforesaid to the prison of the *Fleet* rendered, according to the form of the recognizance aforesaid, as on the information of the said *William* our said the Lord the King is given to understand. And because, &c. that by good, &c. he should make known to the said *Edward* and *Thomas* *, that they be here on the morrow of *All Souls*, to shew if they have or know any thing, &c. (that is to say,) the said *Edward* to shew why the said 90*l.* by him in form aforesaid acknowledged should not be made of his lands and chattels, and to the use and behoof of the said *William* levied; and the said *Thomas*, why the said 90*l.* by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use of the said *William* levied; (and the said *John*, why the said 180*l.* by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use of the said *William* be levied;) according to the form and effect of the said recognizance, if, &c. And now at this day, the said *William* cometh here, by *R. L.* his attorney, and offered himself on the fourth day against the said *Edward*, *Thomas*, (and *John*), in the plea aforesaid; and they the said *Edward*, *Thomas*, (and *John*), although solemnly called, came not; and the sheriff now returneth that he hath made known to the said *Edward*, *Thomas*, (and *John*), that they be here on the day in the said writ mentioned. And thereupon the said *William* prayeth execution against the said *Edward*, *Thomas*, (and *John*), (to wit,) against the said *Edward* of the said 90*l.* by him in form aforesaid acknowledged, and

(* and *John*)

If against defendant.

The sheriffs return.

Prayer of execution.

and against the said *Edward* of the said 90*l.* by him in form aforesaid acknowledged, (and against the said *John* of the said 180*l.* by him in form aforesaid acknowledged,) according to the form of their recognizance to be adjudged to him, &c. Therefore it is considered that the said *William* Judgment have execution against the said *Edward*, *Thomas*, (and *John*,) (that is to say,) against the said *Edward* of the said 90*l.* by him in form aforesaid acknowledged; and against the said *Thomas* of the said 90*l.* by him in form aforesaid acknowledged, (and against the said *John* of the said 180*l.* by him in form aforesaid acknowledged,) by their default, &c.

In case there be two *scire facias*'s of the same term, then your entry will be thus, after the words, "according to the form and effect of the said recognizance, if, &c."

And now at this day cometh here the said *William* by *L. R.* his attorney, and offered himself on the fourth day against the said *Edward* and *Thomas*, in the plea aforesaid; and although they solemnly called, came not; and the sheriff now returneth, that the said *Edward* and *Thomas* have not, nor hath either of them, any thing, &c. nor are they, or is either of them, found, &c. Therefore, as before, the sheriff was commanded that by good, &c. he should make known to the said *Edward* and *Thomas* that they be here in fifteen days of *St. Martin*, to shew in form aforesaid. At which day the said *William* cometh by his said attorney, and offered himself on the fourth day against the said *Edward* and *Thomas*, in the plea aforesaid, and they, although solemnly called, came not; and the sheriff, as before, now returneth, that the said *Edward* and *Thomas* have not, nor hath either of them, any thing, &c. nor are they, or is either of them found, &c. And thereupon the said *William* prayeth execution (as in the last judgment).

Entry of two *scire facias*'s of the same term against the bail only.

N n

If

If sci. fa.'s be of different terms.

If the two *sci. fa.*'s be of different terms, then the entry of the second *scire facias* will be thus:

Middlesex, to wit: *Heretofore*, as it appeareth in the term of the *Holy Trinity* last past, on the 7th roll, it is thus contained: *Middlesex*, to wit, The sheriff was commanded (to the end of the entry on the roll made on the first *scire facias* and sheriff's return), Therefore, as before, the sheriff was commanded, that by good, &c. he should make known to the said *Richard* and *Thomas*, that they be here on the morrow of *All Souls*, to shew in form aforesaid. At which day cometh the said *William* by his said attorney (as in the last entry exactly).

Return of second
sci. fa.

Of Appearance.

If the bail appear, make a *præcipe* for the prothonotaries thus:

Præcipe for appearance to the
sci. fa.

Middlesex, to wit. Appearance for *Edward Legg* and *Thomas Flemming*, bail of *John Fell*, (and for *John Fell*) ats. *William Read*, to a * *sci. fa.* returnable on the morrow of *All Souls*; pay entry 3s. 10d. This is frequently done after the bail are fixed, to get a term; but they are not liable to costs unless they plead. 8 & 9 W. 3. c. 10. f. 3. *Cooke's Rep.* 74. 109. A memorandum or minute on a 2s. 6d. stamp should be filed at same time 25 Geo. 3. c. 80.

If appearance entered, how to proceed.

When the bail have appeared, deliver a declaration upon treble penny stamped paper; give a rule to plead, and demand plea as in other cases; and if the declaration is not delivered *four days exclusive* before the end of the term, they will be intitled to an imparlance.

Declaration,

Middlesex, to wit. It was commanded to the sheriff, Whereas (to the end of the entry on the roll of the second *sci. fa.*; or if there be but one *sci. fa.*, to the end of that entry), as far as the sheriff's return, then say, And now here, at this day

* If to the alias, say to alias *sci. fa.* return, &c.

came as well the said *William* by *J. H.* his attorney, as the said *Edward* and *Thomas* by *J. S.* their attorney; and the said *William* offered himself on the fourth day, against the said *Edward* and *Thomas* in the plea aforesaid. And upon this the said *William* prayerh execution against the said *Edward* and *Thomas*, to be adjudged to him of the debt and damages aforesaid, according to the force, form, and effect of the said recognizance, &c.

N. B. The declaration may be intituled as of the term generally, for the court consider the whole term as one day, although the *sci. fa.* was returnable the last return of the term. 3 *Wils.* 154. *Ward v. Gansell.* How to intitle declaration.

A record may be amended of an issue of *nul tiel* record by the writ of *scire facias*, Barn. 3. So by the record in the original action, *ibid.* 4. Amendment by *sci. fa.*

Agreed, both by the bench and bar, that if the principal defendant dies *after the return of the ca. fa.* although his death be *before* the suing forth the *first sci. fa.* the bail are fixed with debt and costs in point of law, and the *sci. fa.*'s are only an indulgence of the court. 2 *Wils.* 67. *Filewood v. Popplewell & another.* When bail are fixed.

What Bail may plead in discharge.

The bail may plead, that no *ca. fa.* ever issued against the defendant, *secundum cursum curiae*, Lutw. 1285.; that the principal died before a *ca. fa.* returned, *Roll. Abr.* 336.; that the plaintiff had other execution against him; that the defendant paid the money recovered, 1 *Roll.* 336. l. 35. 4 & 5 *Ann. c.* 16. s. 12.; or that the principal surrendered himself, 3 *Lev.* 152.; but they cannot plead that the principal died *before the return of the sci. fa.* because if he died on the day of the return of the *ca. fa.* the bail are liable. 1 *Roll.* 336. 5 *Mod.* 167. They may plead *nul tiel record*, *Thom. Ent.* 285. *Thef. Brev.* 265. or a release to the defendant. 1 *Roll.* 336. l. 35. What bail may plead, and what not.

Bail not liable to costs in error.

If there be error brought by the principal, which afterwards is nonproffed with costs, yet the bail in the original action are not liable to the costs in error, but only the damages recovered in the original action, because they only became bound in that action, *Cro. Jac. 636. pl. 4.*

If no satisfaction against bail.

If execution issue against the bail, and there be no satisfaction from them, yet the plaintiff may take the principal. *2 Cro. 320. 549. 1 Sid. 107.* If one of the principal be taken, and not the other, the bail are not discharged. *2 Lev. 195.*

After recovery of judgment against the bail, the bail may be held to bail in an action on that judgment; for then it becomes a debt as against them by the recovery. *Bute v. Moore. Trin. 28 Geo. 3.*

Ca. sa. against bail in debt.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: We command you, That you take *Edward Legg*, late of *Lotbbury, London*, hosier, and *Thomas Fleming*, late of the same place, plaisterer, bail of *John Fell*, late of *London*, vintner, if they be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at *Westminster*, in eight days of *Saint Hilary*, to satisfy *William Read*, 90*l.* and 90*l.*; which several sums they the said *Edward Legg* and *Thomas Fleming*, heretofore, to wit, in the term of the
Holy

The like in case.

George the Third, &c.
To the sheriff of *Middlesex*, greeting: We command you, That you take *Thomas Lime*, of &c. hosier, and *Richard Frame*, of the same place, ironmonger, bail of *Thomas Lee*, late of *Westminster*, in your county, smith, if they be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at *Westminster*, in eight days of *Saint Hilary*, to satisfy *Henry Bridges*, 102*l.* 17*s.* and 102*l.* 17*s.*; which several sums they the said *Thomas* and *Richard* heretofore, to wit, in the term of the
Holy

Holy Trinity, in the 33d year of our reign, before Sir *James Eyre*, Knight, and his companions, then our justices of the Bench at *Westminster*, severally acknowledged to owe to the said *William Read*, to be made of their and each of their lands and chattels, and to the use and behoof of the said *William Read* be levied, in a certain plea of debt upon demand for 145*l.* against the said *John Fell*, in our same court prosecuted ;

Holy Trinity, in the 33d year of our reign, before Sir *James Eyre*, Knight, and his companions, then our justices of the Bench at *Westminster*, severally acknowledged to owe to the said *Henry*, to be made of their and each of their lands and chattels, and to the use and behoof of the said *Henry*, be levied, in a certain plea of trespass on the case upon promises, to the damage of the said *Henry* of 150*l.* against the said *Thomas Lee*, in our same court prosecuted ;

And whereof the said *John Fell* was convicted, as *Thomas Lee*. by the record and proceedings thereon in our same court, before our said justices at *Westminster*, aforesaid, remaining, manifestly appears : and whereupon it is considered in our same court, That the said *William* have his execution against the aforesaid *Edward Legg* and *Thomas Fleming*, of the said several sums of 90*l.* and 90*l.* by them in form aforesaid acknowledged, by the default of the said *Edward* and *Thomas*, whereof they are convicted ; *Henry. Thomas and Richard.* and have there this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 28th day of *November*, in the 34th year of our reign.

To be signed by the prothonotaries, pay 4*d.* To be signed by seal 7*d.* warrant 2*s.* 4*d.* and to be ingrossed upon prothonotaries: a 2*s.* 6*d.* stamped parchment.

If a *testatum* say, after the words, by the default *Testatum.* of the said *Edward* and *Thomas*, “ And whereupon our Sheriff of *Middlesex* sent to our justices at *Westminster*, at a certain day now past, that the said *Edward* and *Thomas* were not, nor was either of them

them found in his bailiwick, whereas it is testified in our same court, that the said Edward and Thomas lurk and secrete themselves in your county, and have there this writ. *Witness, &c.*

N. B. A *ca. sa.* must be sued out with the *testatum* in all cases. So in the *K. B.*

Fi. sa. against
the bail in debt.

* Trespass on
the case to the
damage of the
said William of
1451.

George, &c. To the sheriff of *Middlesex*, greeting: We command you, that of the goods and chattels in your bailiwick, of *Edward Legg*, late of, *&c.* hosier, 90*l.* and of the goods and chattels in your bailiwick, of *Thomas Fleming*, 90*l.* which said several sums they the said *Edward Legg* and *Thomas Fleming*, heretofore, to wit, in the term of the *Holy Trinity*, in the 33d year of our reign, before Sir *James Eyre*, Knight, and his companions, then our justices of the Bench at *Westminster*, severally acknowledged to owe to *William Read*, to be made of their, and each of their lands and chattels, and to the use and behoof of the said *William* be levied, in a certain plea of debt * upon demand for 145*l.* against *John Fell*, late of, *&c.* vintner, in our same court prosecuted, and whereof the said *John Fell* was convicted, as by the record and proceedings thereon in our same court, before our said justices at *Westminster* aforesaid, remaining, manifestly appear; and whereupon it is considered in our same court, that the said *William* have his execution against the aforesaid *Edward Legg* and *Thomas Fleming*, of the said several sums of 90*l.* and 90*l.* by them in form aforesaid acknowledged, by the default of them the said *Edward* and *Thomas*; and have that money before our justices at *Westminster* in eight days of *Saint Hilary*, to render to the said *William* for the debt aforesaid, according to the force, form, and effect of the said recognizance whereof they are convicted; and have there this writ. *Witness* Sir *James Eyre*, Knight, at *Westminster*, the 28th day of *November*, in the 34th year of our reign.

Rul

Rule why an exoneretur should not be entered on the bail-piece, on the ground that the *capias ad resp.* against the principal in the ac-etiam was in case for 25*l.* on promises, but that declaration was in debt for 260*l.* on simple contract. *Holmes v. Small* was cited. *Pract.* 137. *against the rule.* The court were of opinion against the rule, and held that the difference between the ac-etiam and the count is not material, and discharged the rule. *Lockwood v. Hill.* 1 *H. Black. Rep.* 320. Sergeant *Marshall's* argument against the rule was, That as the sum sworn to was under 40*l.* the defendant might have been arrested and holden to bail on a common *clausum fregit* without an ac-etiam. The *Stat.* 13 *Car.* 2. *st.* 2. *c.* 2. which requires the cause of action to be expressed in the writ, and which gave rise to the clause of ac-etiam, operates only where the sum is above 40*l.*; when the debt is under 40*l.* the ac-etiam is not necessary, and a difference between that and the count is not material, as relating to the bail who engage to be answerable for the debt of the defendant. The court were of this opinion.

Variance between the writ and count, the ac-etiam being in case, and declaration in debt is not a ground for entering an exoneretur on the bail-piece.

N.B. The bail in this action it is true were bound in double the sum sworn to, to render the defendant, or pay the condemnation: but they were bound in an action to render the defendant, at the suit of the plaintiff, in a plea of trespass on the case for 25*l.* and not in a plea of debt for 260*l.* Therefore quære as to the determination.

Observations

In an action of trespass and assault to the damage of 500*l.* Mr. Justice *Fortescue* had ordered bail for 140*l.* and the defendant being present at the time the recognizance of bail was taken, his bail were bound jointly and severally in 140*l.*; plaintiff recovered a verdict for 300*l.* and the bail moved to stay proceedings against them both, on their payment of 140*l.*; and upon shewing cause, the court were of opinion, that as the damages in the writ were laid at 500*l.* here is no fraud upon the bail, the recognizance is separate as well as joint, and

Each of the bail are liable to pay the whole penalty of the recognizance, if not more than the sum recovered,

in its nature a judgment, the award of the court thereupon, that the plaintiff have execution; therefore so far as the penalty of such recognizance will go, it is just and equitable the same be applied towards satisfaction of the condemnation money, for payment whereof, and not of any particular sum, the condition is. *Barnes 76. Calvera & Ux. v. De Miranda.*

When proceedings are staid for a time certain, above a year, proceedings may go on at the expiration of the time, without a term's notice.

Haydon was sued in covenant; the father became bail for him; after which a compromise took place, in pursuance of which the father paid 260*l.* and the son to have three years and an half to pay the residue. The defendant then filed a bill in *Chancery*, and obtained an injunction, which was afterwards dissolved, and then a *ca. sa.* was taken out against defendant; and two *sci. fa.*'s against bail, and a *fi. fa.* against the father. Upon motion to set aside the proceedings against the bail as irregular, no proceedings having been had for upwards of three years till suing out *ca. sa.* and *sci. fa.* alleging that there ought to have been a term's notice; the court held, that as in this case it appeared that the bail was the principal agent, and consant of the whole transaction, it was no surprize on him; and that an agreement to stay proceedings for a limited time, to enable the defendant to pay the debt, on default of which the plaintiff was to proceed, was in its nature an exception out of the rule. *E. 13 Geo. 2.*; and that at the expiration of the time, the proceedings may be renewed, without a term's notice; else it would in effect be a stay of proceedings for a whole term beyond the time agreed on. *2 Black. Rep. 762. Watkins v. Haydon.*

Some notice must be given of suing out *sci. fa.* against the bail by the sheriff, on a *sci. feci* returned.

Motion to stay the proceedings on a *sci. fa.* sued out against *Lowing* and *Spite*, defendant's bail, they not being served with a copy of the sheriff's warrant, which recites the writ. But the one (*viz. Lowing,*) by giving him a personal summons, and reading to him the sheriff's warrant; the other, by leaving a memorandum (containing the substance of the writ) with his wife, at his house.

in his absence. It appeared (on inquiry of the officers) that it is usual in *Middlesex* to serve the bail with a copy of the sheriff's warrant, but not so in many other counties; and this arose in *Lincolnshire*. In some counties they give verbal notice; in some, none at all. The court held some notice should be given, *Salk.* 599, the sufficiency of which (if disputed) must be determined by the court, on the circumstances; and that this notice was sufficient. *Rule disc.* 2 *Black. Rep.* 837. *Wright v. Page.*

Some notice necessary.

Of rendering the Defendant by his Bail after Judgment against the Principal.

If the bail mean to acquit themselves of their recognizance entirely, and run no hazard of the death of the defendant, then they must render him in their discharge, before the *return day* of the *ca. sa.* as the death of the principal afterwards will not discharge them; but if they do not, then they have until the appearance day of the return (if the proceedings are by original) *sedente curia* of the first *sci. fa.* if returned *scire feci*; but if a *nihil* is returned thereon, then until the appearance day of the return of the second *sci. fa. sedente curia.* *Barnes* 82. *Derisley v. Deland.* So in *K. B.* 4 *Burr.* 2134. 1 *Wils.* 270.

Within what time bail may render.

It is laid down, that bail may take their principal on a *Sunday*, and confine him till the next day, and then surrender him; but one of them must stay all the time with him, unless he consents to remain at a lock-up house. 6 *Mod.* 231. 1 *Atkin.* 239. But bail to the sheriff cannot render him. 2 *Black Rep.* 1273.

Bail may seize a bankrupt whilst under examination, or going to a court of justice.

Bankrupt.

But if the action be by attachment of privilege, then they must render on the *return day* of the second *sci. fa.* or the first, if returned *scire feci, sedente curia.*

If action be by original.

And

When to surrender on an action on recognizance.

Render to be made *sedente curia* on second *sci, fa,*

Bail sued by attachment of privilege may render the principal on the *quarto die post* of the return; as for instance, the writ returned 8th, render 11th good.

And if there be an action on the recognizance, the bail must surrender the principal before, or on the *appearance day of the return of the writ* (if proceedings are by original) *sedente curia*, *Barnes 82, Derisley v. Deland.*

Court declared, to be the opinion of this court, and of the King's Bench, that no render was good unless made before the rising of the court on the *appearance day of the scire facias*, returned *scire fui*, or of the second *scire facias* returned *nihil*. *Vanderegh & al. v. Waylet. Cooke's Rep. 53. Baker v. Bruce.* The like, that a render *after the rising of the court*, upon the *last day* allowed for rendering the defendant, was void. *Ibid.*

The plaintiff in this cause having in last *Hilary* term recovered judgment in the King's Bench against defendant on the 3d of *February*, sued out an attachment of privilege against the bail, tested 23d *January*, returnable on *Wednesday next after the morrow of the Purification*, which was the 8th of *February*; on the 11th the defendant rendered, and an exoneretur entered; notwithstanding which the plaintiff signed judgment against the bail, and then brought an action in the King's Bench. In consequence of which a motion was made in that court to set proceedings aside; a rule was made to refer it to the prothonotaries to report as to the regularity of the proceeding in this court against the bail: and difficulties arising, it was agreed to bring the matter on before the court, the only question being what time bail, when sued by attachment of privilege, ought to render their principal, *whether on the return day of the writ, or on the quarto die post.*

Per cur. The rule of practice ought to be uniform, as to the time in which bail may render the principal; and there is no good reason why they should not have the same time allowed, where the proceedings are by attachment of privilege, as in other cases, *viz.* till the appearance day of the return.

The prothonotaries afterwards reported to the court of King's Bench, that the render on the 11th of February was regular. *Fletcher one, &c. v. Aingell.*

Action against husband and wife for a debt contracted *dum sola*. After judgment both rendered in discharge of the bail; and not being now charged in execution, motion that wife may be discharged on common appearance. *Per curiam*, The rule is, that where there is judgment and execution against both the husband and wife, she shall not be discharged: but if they be both in custody on *mesne process*, the wife shall be discharged on common bail. In the present case, they are rendered to prison in discharge of their bail, are now in the same situation as if bail had never been put in for them; so are really in prison, for want of bail to the first process; and not being charged in execution, the wife must be discharged. *Anon. 3 Wils. 124. 2 Str. 1167. 1237.*

Husband and wife rendered in discharge of bail, she shall be discharged.

If the defendant be in custody of any sheriff or gaoler, the bail may have a *habeas corpus* either in term or vacation, to bring him before the chief justice, or one of the other judges, returnable immediately, in order to render him in discharge of his bail.

If defendant in custody, bail may have a *hab. corp.* to bring him up to render.

If he is a bankrupt, and the debt be contracted previous to the bankruptcy, and has his certificate, a summons to shew cause why an *exoneretur* should not be entered upon the bail-piece, should be taken out and served; and upon producing the certificate to the judge, the bail will be discharged by his order, upon affidavit of the debt having accrued due, *prior to the date and suing forth of the commission.*

If defendant is a bankrupt, may summons to discharge the bail.

If certificate be obtained before the bail are fixed, they shall be discharged; but if they are fixed before the certificate is allowed, they are liable.

How to render.

If the defendant is in town, get the filacer (if the action be by original) to go to the judge's chambers,

How to surrender in town.

chambers, and take the render, pay filacer 7s. 4d. judge's clerk 13s. tipstaff 10s. 6d. The filacer brings his book, wherein the bail are rendered, with him to the judge's chambers, and the judge exonerates the bail at same time.—*N. B.* Notice of the surrender is requisite, but not an affidavit of the service.

Fees must be paid.

The fees must be paid, for the surrender is not complete until entered of record. If not, the entry of the render in the judge's book will be ordered to be struck out. *Huckle v. Ambrose. Cooke's Rep. 131.*

If action by attachment.

If the action be by attachment of privilege, then apply to Mr. *Sherwood* to take the bail-piece to the judge's chambers, pay 7s. 4d. to him, 16s. to the judge, tipstaff 10s. 6d. and give notice of the render, and no affidavit requisite.

Notice of surrender.

Take notice, that the above defendant did this day surrender himself in discharge of his bail, and was thereupon committed by the honourable Mr. Justice *Gould*, to his Majesty's prison of the *Flut*, there to remain until, &c. Dated, &c.

Time of surrender to be entered by the filacer.

The court ordered the hour of the day, or true time of the defendant's surrender, to be entered by the filacer, in order that it might appear, whether the surrender was made before or after the rising of the court. *Barnes 78. Lyng v. Woodyer.*

If for felony.

If defendant is convicted of felony, and pardoned on condition of transportation, and a civil action is depending, this court, I think, will grant a *habeas corpus* at the instance of the bail, that he may be brought up and surrendered. *Vide Str. 1217. 4 Burr. 2034.*

Soldier.

A soldier at large may be surrendered by his bail, and set at large instantly by the court. So an impressed man may be brought up by *habeas corpus*, and surrendered. *Vide 1 Term Rep. K. B. 339.*

Of staying Proceedings against the Bail where Error is brought by the Principal.

The allowance of a writ of error on a judgment by *nil dicit*, is so entirely a *superfedeas* to a subsequent writ of execution, and all proceedings thereon against the bail, that all may be set aside upon motion, 2 *Black. Rep.* 1183. *Dudley v. Stokes*, but no contempt is incurred till after notice to plaintiff's attorney. *Barnes* 376. *Hannot v. Farrettes*.

When writ of error a *superfedeas*. Vide my *Infr. K. B.* 5 edit. 465.

In this court a writ of error is no *superfedeas* from the sealing, but from the delivery to the clerk of errors, *Barnes* 209. *Sykes v. Dawson*; and if the *ca. fa.* be returnable at a time when the writ of error is depending, you cannot proceed against the bail. *Ibid.* 83. *Derisley v. Deland*.

Error *superfedeas* from delivery to the clerk of the errors.

Defendant moved to stay proceedings against bail upon the recognizance till the writ of error be determined; the usual practice has been, if an action be brought against the principal on the judgment, the plaintiff may proceed to judgment, though a writ of error be depending; but this case being against bail, if the plaintiff should obtain judgment, the bail could not render the principal; therefore let all the proceedings be staid pending the writ of error. *Cooke's Rep.* 112. *Newman v. Butterworth*. *Barnes* 66. *S. C.*

Proceedings against bail pending a writ of error, staid, and the rule as to bail, and the principal.

This court refused to stay the proceedings against the bail pending error, it appearing that the defendant's attorney had admitted the writ of error was brought for delay. *Hammond v. Goodewe*. *Trin.* 31 *Geo.* 3. Same practice in King's Bench. 3 *Term. Rep.* 78, 79.

Refused to stay where error admitted to be brought for delay.

Proceedings were staid in an action of debt, brought upon a recognizance of bail against one of the bail, pending a writ of error, without defendant's giving judgment, because thereby the defendant would be precluded from a surrender, which is not reasonable. *Barnes* 68. *Clarke v. Baker*.

The like without giving judgment.

Plaintiff

Pending error action brought on judgment, and after judgment, execution; court would not set it aside, for defendant might have applied in time.

Bail to action on judgment; judgment against defendant, and writ against bail, before return, proceedings against bail staid, pending error to reverse the first judgment, consenting to give judgment.

King's Bench rule.

Plaintiff recovered judgment, defendant brought error, pending which, plaintiff brought an action of debt on the judgment, and after judgment thereon, levied. *Per cur.* The defendant might have moved the court to stay proceedings in the action on the judgment, pending the writ of error, which is always granted; but having made no such application, judgment regular. *Barnes 202. Humphreys v. Daniel. Ibid. 203.*

Plaintiff brought an action on the case against defendant, who appeared, and plaintiff recovered judgment, and then brought debt on the judgment, and held defendant to bail, and recovered a second judgment. After a *ca. sa.* returned against the principal, and before the return of the writ, in an action of debt upon the recognizance, against the bail in the second action, the court was moved to stay the proceedings on the recognizance, pending a writ of error brought to reverse the first judgment; and upon the bail's consenting to give judgment in the actions brought against them, the rule to stay proceedings was made absolute. *Barnes 86. Gostelow v. Wright.*

The course of the King's Bench is, where error is brought by the principal within the time allowed by the court for the surrender, the court will stay the proceedings against the bail "until the writ of error be determined, they undertaking to pay the damages recovered or surrender within four days next after the determination of the writ of error, in case same is affirmed." *1 Burr. 340. Capron v. Archer.* But where bail do not apply till their time is expired to surrender, then they will have four days after affirmance to pay the money. *2 Str. 1270. Richardson v. Jelly.*

Nonpros.

For not declaring.

THE nonpros is a default or neglect of the plaintiff in not following his suit, and in the nature of final judgment.

In what time a nonpros may be signed for want of a declaration.

The rules and cases respecting the nonpros are already stated in p. 235.

If the defendant has appeared in *the term in which the writ is returnable*, and wishes to compel the plaintiff to declare, he may give a rule with the secondary for that purpose, within four days after the end of the second term, (*but not after*,) which expires in *four days*, pay 1 s. 10 d. and demand a declaration of plaintiff's attorney, and for want thereof may sign judgment.

How to compel plaintiff to declare.

If the plaintiff has obtained time to declare and does not deliver his declaration, or file the same in the time allowed, the defendant may sign a *nonpros*, without further notice. *Towers v. Powell.* 1 H. Black. Rep. 87.

In the Common Pleas.

Denn v. Fenn. Rule to declare.

The rule.

Denn v. Fenn. The defendant demands a declaration in this cause by yours, &c.

Demand.

C. K. Defendant's Attorney.

Writ returnable *last* return of *Trinity*. Appearance entered, plaintiff proceeded no further, nor did he take a rule for time: upon which the defendant in *Hilary* term (being the third term from the issuing of the writ) gave plaintiff a rule to declare, and for want of a declaration signed judgment. *The court* held it to be irregular, because the plaintiff by his own default was out of court at the end of the second (*namely, Michaelmas*) term, and the defendant could not therefore rule the plaintiff to declare, but at the end of *that term*, or *within*

Cannot nonpros, unless rule given to declare after the second term, where no rule to declare has been obtained.

within four days after. *Allen v. Milward. Hil. 30 Geo. 3.*

Cannot nonsuit plaintiff for not declaring after removing by ha. corp.

If defendant removes the cause by *babeas corpus*, he cannot nonsuit the plaintiff for not declaring, as the plaintiff is not bound to follow him; but he must declare within two terms after the removal, nor can he be nonprossed after outlawry reversed. *Yer v. Cawsey. Pract. Reg. 271.*

How to sign nonpros.

Enter on a double half crown stamp paper the *nonpros*, file defendant's warrant of attorney with the clerk of the warrants, who will mark the judgment paper, pay 8*d.* take it to prothonotaries, pay 7*s.* 4*d.* for signing.

Entry of a nonpros for not declaring.

Middlesex, (fl.) Richard Fenn, who sued out his Majesty's writ against *John Denn*, late of, &c. of a plea of trespass, doth not further prosecute the same: therefore it is considered by the court that he and his pledges for the prosecution be in mercy, &c. The names of the pledges are *John Du*, and *Richard Roe*; and the said *John* is thereupon from hence for ever discharged without a day, &c. It is also considered, that the said *John* recover against the said *Richard* 33*s.* 4*d.* by the discretion of the justices of the Lord the King here, according to the form of the statute in such case made and provided, at his request, adjudged to him, for his costs and charges sustained by him about his defence in this behalf, &c. *N. B.* 33*s.* 4*d.* are the common costs allowed; if you have any *extra's*, such as *bail above*, &c. the prothonotaries will tax the costs, and the above form will suit a bailable action; and an action can be maintained in this court on the judgment, *Cro. Eliz. 96. 1 Wils. 316. 1 Leon. 316.* though the costs are under 40*s.*

Judgment.

A prisoner cannot sign a *nonpros*, not having filed his bail within the term the writ is returnable; nor can it be signed pending an injunction.

The defendant may take out a *ca. sa.* or *fi. sa.* for the costs, or bring an action on the judgment. *3 Wils. 316. Murray v. Wilson.*

A judgment of *nonpros* may be set aside if signed irregularly, but not after a judgment obtained on the action. *Cooke's Rep.* 75.

Of Nonpros for not replying, &c.

The plaintiff may also be nonprossed in any stage of the suit, for not complying with the rules of the court, viz. for not replying to the defendant's plea, not surrejoinder to his rejoinder, not entering the issue, when served with a rule for that purpose in due time, which is a final judgment, and signed on a double 2s. 6d. stamp paper. (*For the forms of these judgments, see title Judgments.*) N. B. The warrants of attorney must be filed; and there is only an incipitur of the declaration first entered on the judgment paper, and roll, so as to warrant the prothonotaries clerk to sign it; pay 3s.

For not replying,
&c.

Sunday is reckoned a day within these rules, so it be not the last of the four days. Sunday.

Nolle prosequi.

This may be inserted in the replication, in an action where there are several defendants, and they sever in pleading, and the plaintiff finds one of the defendant's plead such a plea as is a bar to this action, viz. *bankruptcy*, or that he has no cause of action against him; he may reply to the other plea, and enter a *nolle prosequi* as to that defendant.

The plaintiff may enter a *nolle prosequi* before the record is carried down to be tried at *nisi prius*, although it be after issue joined. 1 *Salk.* 457. 2 *Roll.* 100. But where there are several defendants, and they do not sever in pleading, the plaintiff cannot enter a *nolle prosequi*. 3 *Salk.* 246. There also cannot be a *nolle prosequi* at the assizes. *ibid.*

If a defendant plead to one part, and thereupon issue is joined, and demur to the other part, the plaintiff may enter a *nolle prosequi* as to one part, and proceed for the other. 2 *Leon.* 177. *Hob.* 180.

But after demurrer to a declaration of two counts against two defendants, because one of them was not named in the *last count*, plaintiff cannot enter a *nolle prosequi* on that count, and proceed on the other. *Vide 4 Term Rep. K. B. 360. Drummond v. Dorant.* But court gave leave to amend on payment of costs.

Where the cause of demurrer is, that the counts are improperly joined, the plaintiff cannot enter a *nolle prosequi* as to some, and leave the others remaining. *Rose v. Bowler. 1 H. Black. Rep. 108.* This was where a *nolle prosequi* was entered, and a joinder in demurrer delivered.

Where two defendants in assumpsit severed in pleading, and the one pleaded a bankruptcy, which on issue joined was found for him, it was held, that the plaintiff might enter a *nolle prosequi* as to him, and proceed to final judgment and execution against the other. *1 Wils. 89. Noke v. Ingham.*

Issue and demurrer.

Where there are divers issues, and an issue and demurrer in one cause joined between the parties, the plaintiff may enter on the roll a *nolle prosequi* that he will not proceed on one or more of the issues, or the demurrer joined, and notwithstanding proceed to trial upon the rest. *Hob. 70.*

Action against three, one pleads the general issue, the other two, special pleas before judgment; on demurrer plaintiff may enter a *nolle prosequi*.

Action against three, one pleads the general issue, the other two specially, the plaintiff demurs to the special plea, and tries the general issue on which he hath a verdict and judgment; but before judgment on the demurrer, he enters a *nolle prosequi* as to the demurrer. It was held, that if the *nolle prosequi* had been entered before the verdict and judgment, it had discharged the whole action, being the nature of a release in law to the others. So also if judgment had been against all the defendants, and the plaintiff had entered the *nolle prosequi* for two wherein a discharge of one, discharges the other. *Hob. 70.*

In trespass.

In trespass against several, the plaintiff may enter a *nolle prosequi* as to one, and that will not discharge the

the other. *1 Wils. 90.* As to the entries, *2 Saund.*

202. 205. 339. 342.

If in trover against a defendant executor, and other defendants not executors, there is a verdict against these, and the executor is found not guilty, judgment shall not be arrested, for plaintiff may enter a *nolle prosequi* as to him. *1 Wils. 306. Dale Eyre.*

Trover.

There is a difference between a *nolle prosequi* and judgment of *nonpros*, for by the latter the plaintiff is put out of court as to all the defendants. *Buller, J. Philpot v. Muller. T. 23 Geo. 3.*

Difference between *nolle prosequi* and *nonpros*.

There is a difference between a *nolle prosequi* and *retraxit*, the first being in nature of a nonsuit, and to bar; but a *retraxit* is a total relinquishment of the suit, and a different operation from a *nolle prosequi*. *Lee, C. J. 1 Wils. 90.*

So of *nolle prosequi* and *retraxit*.

A *retraxit* differs from a nonsuit, in that the one is negative, and the other positive; the nonsuit is a default and neglect, and therefore plaintiff is allowed to begin again on payment of costs; but a *retraxit* is an open and voluntary renunciation of the suit in court, and by this he for ever loses his action.

The like between *retraxit* and nonsuit. *3 Black, Com. 296.*

Proceedings by Attornies.

Vide p. 90.

IF an attorney sues by original, he waives his privilege, 2 *Str.* 837.; or if he sues in another's name, he does the same. Therefore, if he means to sue as a privileged person, the first process is an attachment, which must have *fifteen days* between the *teste* and *return*, it being in the nature of an original writ; and a *præcipe* must be left with the prothonotaries at the time of signing, or it may be quashed. 2 *Black. Rep.* 919. *Frogatt v. Tapscott*; and it is of no force, unless *signed* by the clerk of the warrants before sealed.

Every attachment of privilege to be signed by the clerk of the warrants.

No attachment of privilege to be sealed unless the same be first stamped, or signed by the clerk of the warrants of this court, or his deputy, for which no fee is to be paid, to the intent to shew that such person is an attorney of this court duly entered and continued on the roll of attornies; and if not signed by the clerk of the warrants or his deputy, the same shall be of no force, or require bail. *R. T.* 9 *W.* 3.

Præcipe to be left with the prothonotary.

Every attorney who shall sue out any attachment of privilege against any defendant, shall leave a *præcipe* at the prothonotaries office with the defendants names, not exceeding four in the whole, with the return day thereto, and the day of signing, together with the agent or attorney's name who sues out the same. *R. Hil.* 11 *Geo.* 2.

Attachment of privilege.

George the Third, &c. To the sheriff of *Middlesex*, greeting: Attach *Richard Fenn*, so that you may have him before our justices at *Westminster* on *Wednesday* next after the morrow of *All Souls* to answer *John Denn*, gentleman, one of the attornies of our court of the Bench, according to the liberties and privileges of the same court, for such attornies and other ministers of the same Bench, from time out of mind, used and approved of in the

same, of a plea of trespass on the case* (as the action is), and have you there this writ. Witness Sir James Eyre, Knight, at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

J. Denn in person, 26th *August*, 1793.

Indorse the sum sworn to (if bailable), and the attorney's name who sues out the writ, and the year and day it is signed; a *præcipe* is to be made in this manner:

Middlesex, attachment of privilege for *John Denn*, Gent. one, &c. against *Richard Fenn*, case returnable on *Wednesday* next after fifteen days of *Easter*. *Denn* in person. Affidavit for 27 l. 13 s. 6 d.

Take the *præcipe* and writ to the prothonotaries clerk, who will sign the writ, and keep the *præcipe*; pay nothing for signing. Get it marked by the clerk of the warrants before it is sealed; pay nothing, unless in arrear for termages; sealing 1 d. If the attachment is not bailable, a copy must be served on defendant, with an English notice as for a *scias*: but if bailable, you must apply to the sheriff for a warrant, pay 4 d. in *Middlesex* and *London*.

* There is no ac-etiam to be put in this writ. If you hold defendant to bail, express the nature of the action as in a plea of debt, trespass on the case, &c. 2 *Wils.* 393.

Præcipe.

How to sign the writ.

If not bailable.

Common Appearance, and putting in Bail.

If the attachment requires only a common appearance, it must be entered with the prothonotaries, and a memorandum on a 2 s. 6 d. stamp filed, a *præcipe* is required, pay 3 s. 10 d.; and if it requires special bail, Mr. *Sherwood* prepares the bail-piece (or you may prepare it yourself), which is done on a 2 s. stamp parchment, the form of which is as follows:

How to appear.

Bail-piece on an attachment of privilege.

Michaelmas Term, 34th Geo. 3d.
Middlesex, Attachment of privilege for *J. B.* gentleman, one, &c. against *S. S.* in a plea of trespass on the case. — Bail for 27*l.* 13*s.* 6*d.*

Returnable on *Wednesday* next after the morrow of *All Souls*.
 The bail are *T. D.* of, &c. glover, and *J. G.* of, &c. broker.

Each of the bail in 55*l.* 7*s.*
S. T. Defendant's Attorney.

Bail in double the sum sworn to, if principal does not appear :
 If he does, then in the sum sworn to.

Mr. *Sherwood* attends the judge, or the court, when the recognizance of bail is entered into, and the bail justify, or fresh bail is added, in the same manner as the filacer does on mesne process. Give notice in the same manner of bail being put in, exception and justification ; those forms will do for this ; pay Mr. *Sherwood* 7*s.* 4*d.*

Declaration.

The declaration is to be ingrossed on treble stamp paper, the form of which is as follows :

Michaelmas Term in the 34th year of the reign of King *Geo.* the 3d.

Declaration at the suit of an attorney.

Middlesex, (to wit,) *Richard Fenn*, late of *Westminster*, in the said county, plumber, was attached by a writ of our Lord the King, of privilege issuing out of the court here, to answer to *John Denn*, gentleman, one of the attornies of the court of our Lord the King of the Bench here, according to the liberties and privileges of the same court for such attornies, and other ministers of the same Bench, time out of mind, used and approved in the same of a plea of trespass on the case, &c. And whereupon the said *John Denn*, in his proper person complains, *That whereas*, (the rest as in common cases,) only you must add pledges to prosecute. *Vide title Declaration.*

Venue.

An attorney, when plaintiff, is entitled to lay the venue in *Middlesex*, and it cannot be removed. *2 Salk.* 268.

The want of pledges cannot be taken advantage of in error in this case, but the court seemed to think it might on demurrer. *How v. Denn*. 2 *Wils.* 142.; though *Barnes* 163. is to the contrary. *Littlehales one, &c. v. Bosanquet*. For pledges are upon the writ, and may be found any time before judgment.

The want of pledges cannot be taken advantage of in error.

If an attorney delivers or files his declaration, and gives notice thereof *four days exclusive* of the end of the term in which the process is returnable, the defendant must plead the same term, if rule to plead be given, and plea demanded. And the proceedings by attachment of privilege is with respect to delivery of the declaration and rule to plead, as in common cases. And if an inquiry is executed, the form only differs in this.

When defendant must plead.

George the Third, &c. To the sheriff of *Middlesex*, greeting: Whereas *Richard Fenn*, late of, &c. was attached by our writ of privilege issuing out of our court here, to be before our justices at *Westminster* to answer *John Denn*, one of the attornies, &c. (the same as in the declaration) in a plea, *For that whereas* (here set forth the whole declaration), to the said *John Denn*, his damage of 50*l.* as it is said, and it was in such manner proceeded in our said court of the Bench, that (here go on as in a common inquiry, making the writ returnable on a day certain, instead of a general return day).

Inquiry.

George the Third, &c. To the sheriff of *Middlesex*, greeting: Attach *Richard Fenn*, so that you may have him before our justices at *Westminster*, on *Thursday* next after eight days of *St. Hilary*, to satisfy *John Denn*, gentleman, one of the attornies of our court of the Bench here, 50*l.* which were adjudged to the said *John*, in our same court, before our justices at *Westminster*, for his damages, which he had sustained, by occasion of a certain trespass on the case, done to the said *John* at *Westminster*, in your county, whereof he is convicted; and have you there this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 28th day of *November*,

Ca. 14.

umber, in the 34th year of our reign. Pay signing at the prothonotaries 4 d. seal 7 d.

An attorney taken upon a *ca. sa.* on a nonsuit for costs returnable on a general return, held well,

An attorney having sued by his attachment of privilege was nonsuited and taken in execution for the costs upon a *ca. sa.* returnable on a general return, and held well enough, for the plaintiff had no day in court; nor can any advantage be taken of irregularity of process without having it returned, and before the court. 3 *Wils.* 58. *Perrott one, &c. v. Hele.*

Why process is returnable ats. of an attorney on a day certain.

The reason why process both for and against an attorney is made returnable on a day certain, is because of his daily attendance in court, but this attorney is out of court, and in custody in execution, he has no day in court, and so cannot attend; and therefore in this case he loses his privilege to have this process against him returnable on a day certain. *Ibid.*

Attorney of C. P. may hold to bail an attorney of K. B.; but where of same court, a bill must be filed.

Held, That an attorney of this court may for a debt *bona fide* (but not a note colorably indorsed without a consideration), sue an attorney of the King's Bench by attachment of privilege, and the King's Bench attorney would not be entitled to privilege. But where attorneys plaintiff and defendant are both of the same court, the proceedings must be by bill, and not by attachment, defendant being intitled to privilege. *Barnes 44. Lander one, &c. v. Cockayn.*

Where an attorney of one court sues an attorney of another, the privilege of that court which is possessed of the cause, shall be preferred.

The defendant being sued on an attachment of privilege by the plaintiff an attorney of this court, in an action on the case, pleaded his privilege as an attorney of the King's Bench, to be sued only of that court, to which the plaintiff demurred, and defendant joined, and judgment was for plaintiff. *Vide 2 Brownl. 262. Guy v. Reynell.* Where an attorney of one court sues an attorney of another, that court which was first possessed of the cause, shall retain the jurisdiction of it. 2 *Black. Rep.* 1325. *Danfer one, &c. v. Berryman.*

Proceedings against Attornies.

An attorney has privilege to be sued only in the court where he is an attorney, and by bill, though he accepts a bill of exchange. If the plaintiff and defendant are attornies of the same court, the proceeding must be by bill. Nor trespass will not lie against the sheriff, though he be arrested. *2 Black. Rep.* 1085. In this court the bill must be filed only in term time; *contra K. B. 5 Term Rep.* 325. *Dodsworth v. Bowen.*

When an attorney undertakes to appear and plead for the defendant, the court will compel him to appear; but a plea must be demanded in writing. *Holiday v. Scot. Cooke's Rep.* 65.

Resolved, That an attorney of this court may be sued here for any sum under 40*s.* though it be ever so small. *Gardner v. Jessop, one, &c. 2 Wils.* 42.

If an attorney of this court should be arrested on a King's Bench process, the sheriff need not discharge him on a writ of privilege; for it is laid down as law and practice, that where a privileged person is arrested on process out of a superior court, he may plead his privilege, (*viz.* he must sue out his writ, and produce it with his plea), *sub pede sigilli*; but if on process out of an inferior court, his writ ought to be allowed *instanter*. *Rawlins v. Parry, one, &c. Cooke's Rep.* 2. *Vide 2 Black. Rep.* 1085.

Must plead his privilege if arrested.

But in the King's Bench, if an attorney of that court be arrested by *latitat*, he may be discharged on filing common bail. *1 Wils.* 298. 306. But if he be of a different court, he must not plead his privilege. *Str.* 864. A judge at chambers in K. B. does this on a summons.

King's Bench.

After a verdict, the court will not compel an attorney to discover the place of abode of his client, for he is not obliged to expose his client to be taken in execution. *Hooper v. Harcourt. 1 H. Black. Rep.* 534. *Barn.* 126.

How

How to proceed.

How to sue an attorney of this court.

The defendant to appear, if he lives within 20 miles of London or Middlesex, in four days.

No forejudger to be entered until four days after notice in town; country, eight days.

The first step taken is, to prepare a bill against him, which bill is in the nature of a petition, as the prayer of it is to be relieved; and it is only to compel an appearance, and which is to be ingrossed on a treble 1*d.* stamp parchment; take it to *Westminster*, and give it to one of the criers, who is to call the defendant aloud; that if he does not appear to the same, he will be forejudged the court. The meaning of which is, that he will be struck out of the roll of attornies; pay him 1*s.*; he will get it signed by the prothonotaries, pay 8*d.* per sheet for the entry, or 2*s.* a count. The crier then gives it you back again; annex a common bail-piece at the foot of the bill, take it to the secondaries office, who will give a rule for the defendant to appear, pay 4*d.*; file it with the prothonotaries, pay 4*d.*

The Court declared, that all bills against attornies should be thrice called in open court; then entered with the prothonotaries; and a rule being given thereon by the secondary for the defendant's appearance, the bill should be filed in the prothonotaries office till the rule is out, and afterwards with the *custos brevium*. *Cooke's Rep. C. P. 4.*

Where any bill shall be filed against any attorney of this court, no forejudger shall be entered against him upon such bill, for want of appearance, if the action be laid in *London* or *Middlesex*, and such attorney resides within *twenty miles* of *London*, until *four days after notice* in writing of filing such bill be given to such attorney or his agent, or left at his usual place of abode, and a rule given for such appearance; and if such attorney resides above *twenty miles* from *London*, or the action be laid in any other county than *London* or *Middlesex*, then no forejudger shall be entered till *eight days* after such notice shall be given in such manner as aforesaid, and a rule to appear as aforesaid; the said days to be

be exclusive of the day of giving such notice.
R. H. 11 Geo. 2. Reg. 3.

Declaration against an attorney delivered on 10th May 1793, with notice to plead *in four days*. The last day of the preceding term being on the 13th of May, there was not *four full days* of that term for the defendant to plead. For want of a plea, plaintiff signed judgment in the vacation. On motion this term to set it aside for irregularity, on the ground that the notice to plead ought to have been for the first four days of the next term, the court made rule absolute. *Morgan v. Betts, one, &c. Trin. 33 Geo. 3.*

Bill to be filed four days before end of term, or judgment will be irregular, and set aside.

In the Common Pleas.

Michaelmas term, in the thirty-fourth year of the reign of King George the Third.

To the justices of our Lord the King of the Bench.

Middlesex, (ss.) John Denn, by S. U. his attorney, complains of Richard Fenn, gentleman, one of the attornies of the court of our Lord the King of the Bench, present here in court in his proper person, For that whereas (as in other declarations); but instead of saying, "And therefore he brings suit," you say, "And therefore he prays relief," adding pledges. John Doe and Richard Roe. A memorandum or minute for the plaintiff is to be filed at same time on a 2s. 6d. stamp.

The form of the bill.

In the Common Pleas.

John Denn, Plaintiff,
and

Richard Fenn, gent. one, &c. defendant.

Take notice, That a bill was this day filed in the prothonotaries office, in Tanfield court, in the Inner Temple, London, against you, as of this present Easter term, at the suit of the above plaintiff John Denn, in an action of trespass on the case, on several promises, wherein the plaintiff lays his damage to 20l.; and unless you appear to the said bill

The form of the notice.

* Eight in the country, and above 20 miles.

bill * in four days from the date hereof, you will be forejudged the court. Dated the 6th day of November 1793.

Yours, &c.

S. U. Attorney for Plaintiff.

To Mr. Richard Fenn,
the above defendant.

Bill to be entered, and a number roll put thereon.

No bill shall be filed against an officer, attorney, clerk, or minister of the court, to be called in court, in order to a forejudger, until the bill be actually entered on record, and a number roll actually put to the bill. *R. T. 21 Car. 2. Reg. 2.* This rule is disused unless actually forejudged the court.

How to appear.

If the defendant appears, he enters it with the prothonotaries; make a note or *præcipe* for that purpose, pay 3s. 10d.; then the plaintiff's attorney delivers a declaration, ingrossed on treble 1d. stamp paper, to him or his agent; charge on the back thereof, as usual, 4d. *per sheet*, and give rule to plead, and proceed as in other cases.

In the Common Pleas.

Michaelmas term, in the 34th year of the reign of King George the Third.

Declaration.

* The day the bill was filed.

Middlesex, (ff.) *Be it remembered*, That on the 6th * day of *November*, in this same term, *John Denn* came here into court, by *S. U.* his attorney, and exhibited to the justices of our Lord the King here, his certain bill against *Richard Fenn*, gentleman, one of the attornies of the court of our Lord the King of the Bench, present here in court in his proper person; the tenor of which said bill follows in these words: *To the justices of our Lord the King of the Bench. Middlesex*, (ff.) *Richard Fenn*, &c. go on with the bill to the end, adding pledges (*verbatim*).

The nature of the action need not be set forth in the memorandum. *Rep. & Cas. Proff. C. P. 105.*

In case the defendant does not plead, you sign judgment exactly as in other cases; and your writ of inquiry will be as follows:

George

George the Third, &c. To the sheriff of Middlesex, greeting: *Whereas John Denn*, by S. U. his attorney came into our court, before our justices at Westminster, and exhibited to our said justices, his bill against *Richard Fenn*, gentleman, one of the attornies of the court of the Bench, present in our said court in his proper person, of a plea, *For that* (to the end of the declaration), to the damage of the said *John*, of 20 l. as it is said: and it was in such manner proceeded in our said court of the Bench (go on as in a common inquiry, only make the return on a day certain, instead of a general return). The prothonotaries sign the writ, seal 7 d.; and to be ingrossed on a 2 s. 6 d. stamp parchment, pay prothonotaries 1 s. 4 d. first count, and 8 d. each other; if a special action 4 d. per sheet.

Writ of inquiry.

If the defendant pleads, the issue is made up beginning with the memorandum of the declaration; provided it be of the same term the bill is filed; but if not, you must get a bill roll of the prothonotaries, the term the bill was filed of; enter the declaration thereon exactly, and make an imparlance over to the term the issue is to be of; pay the prothonotaries 8 d. per sheet, then draw your issue, which is also entered on a roll the term in which the issue is delivered, and ingross it on a treble penny stamp paper, the form of which is as follows:

How to make up issue, if plea of same term.

If of a different term.

In the Common Pleas.

Hilary term, in the 34th year of the reign of King George the Third.

Heretofore as it appeareth in the term of Saint Michael last past, on the 864th roll, it is thus contained; *Middlesex*, to wit, Be it remembered that on the 6th day of November, in this same term, *John Denn* came here into court by S. U. his attorney, and exhibited to the justices of our Lord the King of the Bench here, his certain bill against *Richard Fenn*, gentleman, one of the attornies of the court of our said Lord the King of the Bench, present here in court in his proper person; the

The entry of an issue on a bill against an attorney, where the issue is joined in a term subsequent to that in which the bill was filed.

tenor

tenor of which said bill followeth in these words; to wit, To the justices of our Lord the King of the Bench. *Middlesex*, to wit, *John Denn* complains of *Richard Fenn*, gentleman, (here set forth the bill verbatim,) and thereupon prayeth relief, &c. pledges to prosecute *John Doe* and *Richard Roe*.

Imparlance,
plea, and issue.

And the said *Richard*, in his own person, comes and defends the wrong and injury, when, &c. and prays leave to imparl thereto here, until *Wednesday* next after eight days of *Saint Hilary*, in this same term, and he hath it, &c.; at which day comes here, as well the said *John*, by his said attorney, as the said *Richard* in his own person; and the said *John* prays, That the said *Richard* may answer his said bill, &c. and the said *Richard*, as before, defends the wrong and injury, when, &c.; and says, That he did not undertake, and promise, in manner and form as the said *John* hath above thereof complained against him; and of this he puts himself upon the country; and the said *Richard* doth the like, &c. Therefore the sheriff is commanded, that he cause to come here, on next after twelve, &c. by whom, &c. and who neither, &c. because as well, &c.

Issue.

Record.

Ven. & ha. corp.
jurat.

Forejudger for
want of an ap-
pearance.

Charge on the back of the issue the same as in other cases; and if not paid for on demand, sign judgment; if paid for, *the record* is made up exactly from the issue, with one *placita*, if it is tried the same term the issue is delivered, leaving room for another; and in the *jurata* you call the defendant exactly as in the pleadings; the *venire*, and *habeas corp. juratorum*, are to be returnable on a day certain. But if the cause is to be tried of a different term to that in which the issue is delivered, then there must be two *placitas*.

If the defendant does not appear in due time, sign a forejudger, which enables you to strike him off the roll, and then he may be sued as a common person, either by arrest or service; for after a forejudger he cannot be proceeded against by bill: get a roll at prothonotaries, make the entry complete thereon,

thereon, then take same to their clerk, with an *incipitur* thereof on a 2s. 6d. stamp paper, and he will sign the forejudger, pay 2s.; take the roll to the clerk of the warrants, who will strike the attorney off the roll, pay him 1s. 4d.; docket the roll with the prothonotaries.

Of forejudging.

Forejudged the court, is when an officer of any court is banished or expelled the same for some offence; or for not appearing to any action by bill filed against him; he therefore loses his office, and is forejudged the court: *Forejudicare, interdum est male judicare. Spelm.* The defendant will not be restored, unless he pays the debt and costs. This mode of proceeding is only made use of in this court.

Forejudger, what.

Middlesex, to wit, Be it remembered (here copy the memorandum the same as to the declaration, and go to the end of the bill filed, adding pledges), then say, Whereupon the said Richard being solemnly called, came not, therefore he standeth forejudged from exercising his office of attorney for his contumacy, &c.

Forejudged

Pending a forejudger obtained against defendant by another person, plaintiff sued him by bill, as having privilege of an attorney. Defendant moved to set aside the second forejudger, insisting that his privilege was suspended by the first; and plaintiff ought to have sued him by original in the common way. Rule abs. without opposition. *Vincent v. Willoughby, one, &c. Barnes 43.*

A second forejudger cannot be signed.

When the defendant hath made satisfaction to the plaintiff, he must summon the attorney before a judge in vacation, to shew cause why he should not be restored; and if it appears that the plaintiff hath been satisfied, an order or rule will be made for that purpose for the clerk of the warrants to restore him, who does it without any entry; he keeps the order.

Restoring after forejudger in vacation. In term it must be done on an affidavit in the Treasury chamber.

Vide

Vide a writ of privilege to an inferior court my *Instr. Cler. K. B.* 5 edit. 477.

Proceedings against an Attorney for a Contempt.

Proceedings on attachment for contempt, vide p. 104.

In the outset of this work it has been observed, that attornies are liable to be punished in a summary way, either by attachment, or having their names struck off the roll for mal-practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; and he shall pay the costs thereupon, or shall be committed. *Sii. Pract. Reg.* 2. 3. But such attachment shall not be granted before a day allowed for cause to be shewn. *Mod. Cas.* 16. *Vide Barnes* 77.

An attorney admitted fraudulently, attachment against the master.

An attorney admitted fraudulently was struck off the roll, and an attachment was granted against the master. 2 *Black. Rep.* 991. *ex parte Hill and Hargravé.*

An attorney forejudged suing a writ out in his own name is liable to an attachment. *Cowper v. Sayer.* *Cooke's Rep.* 117.

If the court is moved for an attachment against an attorney, and it is granted, then the form is as follows:

Attachment.

To be ingrossed on a 2s. 6d. stamp parchment, signed by prothonotaries; pay 1s. 4d. seal 7d.; and at the foot of it put the substance of the rule, and say, in a cause, *Denn* against *Fenn*, gent. one, &c.

George the Third, &c. To the sheriff of *Middlesex*, greeting: Attach *Richard Fenn*, gentleman, one of the attornies of the court of Common Bench, so that you have him before our justices at *Westminster* on _____ next after the octave of *Saint Hilary*, to answer us of and concerning those things which shall then on our behalf be objected to him; and have you there this writ. Witness *Sir James Eyre*, Knight, at *Westminster*, the 28th day of *November*, in the 34th year of our reign.

The reason why an attachment is not to appear and make answer to the plaintiff in the cause, upon whose application such attachment was granted, but to answer us, which is to our Sovereign Lord the King, is, because it is for a contempt of the court; and

Proceedings against Attornies:

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and the king being supposed by law to be the fountain from whom all justice flows, therefore he must answer the contempt to him; and the fine which is imposed for such contempt is the king's, and to be created into his Exchequer.

When an attorney is taken on an attachment for contempt, he must put in bail before a judge to answer the contempt; the bail enter into a recognizance for him at the return of the writ, to appear from day to day, till the court shall determine concerning the matters objected against him: and upon motion by his counsel, the court make a rule, that unless his adversary exhibits interrogatories against him in four days from such rule, he shall be discharged.

If attorney is taken on an attachment, how to proceed.

Serjeant Rannington moved for a rule on the sheriffs of London to bring up the defendant, who was in their custody, under an attachment for contempt, in order that he might give bail to answer interrogatories: *The Court* (as the party was not in custody of the warden of the Fleet) refused the rule, saying he could only be brought up by *habeas corpus*. *The King v. Umfreville, one, &c. Trin. Geo. 3.*

Cannot move for defendant to answer interrogatories, unless he be in the Fleet.

On a justification of bail to an attachment of contempt, it hath been held, that reasonable notice is sufficient, therefore notice on 25th of June, to justify on the 26th, was held sufficient, as the bail lived in Holborn. *The King v. Hall. 2 Black. Rep. 110.*

One day's notice to justify in this case if bail live near.

These interrogatories must be ingrossed on a double 12d. stamp parchment, and signed by a serjeant, and filed with one of the secondaries; and after such attorney hath been sworn before a judge (*a commissioner will not do*), he is examined by such secondary, who afterwards makes copies of the depositions for each party, on treble penny stamp paper, seventy-two words to a sheet; pay 1d. per sheet for copy and duty: and if the proctor, to whom the matter is generally referred, reports that he is in contempt, the court

Interrogatories, how to be prepared.

P p

commit

Proceedings against Attornies.

commit him to the *Fleet*; or if he is reported innocent, they discharge him. If he neglects to appear to be examined, or neglects attending the court when he is directed to come, the court will order his recognizance to be estreated; and if he confesses any thing material in his depositions, there is no occasion for witnesses; but you move on his confession.

In the Common Pleas.

Michaelmas term, in the 34th year of the reign of King *George* the Third.

The form of the interrogatories.

Thomas Lee,
against

James Sibbs, gent.
one, &c.

Interrogatories to be administered to *James Sibbs, gent.* one, &c. gentleman, one of the attornies of the court of our Lord the now King of the Bench, at *Westminster* touching and concerning a contempt supposed to be by him committed against the said court.

Here insert the interrogatories in the common form; and at the foot of them put the *jurat*, thus
The above-named *James Sibbs* was sworn, this day of 1793, true answer to make to such questions as shall be asked him, on his examination on the above interrogatories before me, at my chambers, in *Serjeant's Inn* *Chancery Lane*.

Of taxing an Attorney's Bill.

Attornies not to commence an action for fees till one month after delivery of their bills.

No attorney of this court shall commence an action for the recovery of any fees, charges, or disbursements, until one month after he shall have delivered to the party to be charged therewith, or left him at his dwelling-house or last place of abode (that so the client may have an opportunity of looking into it before he is run to further expence) a bill of such fees, charges, and disbursements, in common legible hand, and in the *English* tongue (except law terms and the names of writs,) and words at length, (except times and sums,) full

scribed

scribed with the proper hand of such attorney. And upon application by the party chargeable by such bill, or any other in that behalf authorized, unto any judge of the court, &c. where the business, or the greatest part thereof in amount or value was transacted, and upon submission of the party, or other person authorized as aforesaid to pay the whole, that upon taxation what shall appear due to such attorney, the judge, &c. is required and empowered to refer the bill, and the whole of such demands thereupon, (although no action be depending touching the same,) to be taxed without any money being brought into court. And if the attorney, having due notice, shall refuse to attend such taxation, the officer may proceed *ex parte*, (pending which reference no action shall be brought,) and upon such taxation the party shall forthwith pay to the attorney the whole that shall be found due, and in default be liable to an attachment, or process of contempt, or other proceedings, at the election of the attorney. And if upon such taxation it shall be found that such attorney has been over-paid, then the attorney shall forthwith pay to the party all such money as the officer shall certify to have been so overpaid; and in default, shall in like manner be liable to attachment, or process of contempt, or other proceeding, at the election of the party. And the court is to award costs of such taxation, according to the event thereof, viz. if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs; if not less by a sixth part, the court at discretion shall charge the attorney or client in regard to the reasonableness or unreasonableness of the bill. 2 Geo. 2. c. 23. s. 23.

Judges to refer them to be taxed.

If it appears he has been over-paid, &c.;

if less than a sixth, to pay costs; if not less, the client to pay.

Nothing in the said act contained shall extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor to any other attorney or solicitor, or clerk in court, but that every such attorney, solicitor, or clerk in court, may use such remedy for recovery of his fees, charges, and disbursements,

Not to extend to any bill of fees between one solicitor and another.

bursements, against such other attorney or solicitor, as he might have done before the making the said act. 12 Geo. 2. c. 13. s. 6.

A bill may be wrote with such abbreviations as are commonly used in the *English* language. *Ibid.* sect. 5. *Ray v. Jackson. Pract. Reg.* 37.

Bill for conveyancing.

An attorney's bill for conveyancing only, is not liable to be taxed otherwise than by a jury upon a *quantum meruit. Hillier v. James. Barnes* 41. Nor is it to be taxed after inquiry executed. *Pract. Reg.* 38. *Clarke against Taylor.*

Not to be taxed after inquiry.

If dead.

If an attorney is dead, and his administrator delivers a bill, it need not be signed. *Griffith, admr. v. Squire. Cooke's Rep.* 58. So an executor. *Ibid.* But the K. B. make an order for taxation, though this case is contrary.

Bill not signed.

A bill not signed by the attorney is not liable to be taxed. *Ellison v. Kirby. Cooke's Rep.* 60.

After bond given.

Attorney's bill after a bond given five years and vouchers delivered up, not to be taxed. *Morphy v. Carter. Pract. Reg.* 37. *Cooke's Rep.* 109. S. C.

Allowed the costs.

An attorney was allowed the costs of taxing his bill, where only a ninth part is taken off. *Hirsh v. Dixon. Cooke's Rep.* 78.

Not to be taxed at *nisi prius* or before sheriff.

If an attorney's bill has been delivered a month, and not referred for taxation, the defendant (in an action brought against him) shall not be permitted to question the reasonableness of the items, at *nisi prius*, nor before the sheriff. *Dougl.* 198.

But may before plea.

But it may be referred to be taxed before plea or interlocutory judgment.

How to obtain a bill.

If an attorney refuses to deliver a bill to his client signed, he may take out a summons in one of the causes in this court for that purpose, before a judge; if he neglects attending three summonses, the judge will on affidavit of the service being made, and the attendances thereon, grant an order *ex parte* for him to deliver his bill in a reasonable time; and if he makes further default on his being served with the order, on affidavit of such service

vice personally, and shewing the original, an attachment of contempt may be moved for. If a bill is delivered signed in the first instance, or in pursuance of the order, then you apply to a judge for a summons to shew cause why it should not be referred to one of the prothonotaries to be taxed; and if he attends and the judge sees it reasonable, he will grant an order of course; but if the attorney does not attend, there must be three summonses taken out, and affidavit made of the service and attendance thereon, before he will grant an order *ex parte*: when the order is made, a copy is served, with the prothonotaries appointment thereon to tax; and in case he does not attend, there must be three appointments before he can proceed; and on affidavit of such service and attendances being tendered to the prothonotary, he will tax the bill *ex parte*.

If delivered, how to get it referred for taxation.

N. B. The client must undertake at the judges chambers to pay what shall appear to be due on the taxation, or you must do it on your own account.

The length of time in either court, for the taxation of an attorney's bill, is not settled after paid; but it must be *within a reasonable time*, and also it must appear to the judge in such case, that there are great overcharges, or he will not grant an order. *Vide my Instr. 5 ed. 480. K. B.*

The time for taxing an attorney's bill when paid is not settled.

Proceedings against Peers and Members.

The practice in this court hath been, to sue *peers of this realm, as also members of parliament*, by original bill and summons; therefore if either are to be sued, draw a bill, (ingross it on a treble 1d. stamp parchment,) get it signed by the prothonotaries, (pay 8d. per sheet), file same with the filacer of the county where the *venue* is laid, (pay 8d.) make out a writ of summons, and ingross it on a 2s. 6d. stamped parchment (pay signing 8d. per sheet, seal 7d. summons from the sheriff 2s. 4d.

How to proceed. *Vide p. 131.*

officer 5 s.); if he does not appear in *four days after the return of the writ*, procure a return thereof from the sheriff, then sue out a distringas (if the return be that the sheriff has given notice to the defendant), take the summons and distringas to the filacer, and pay 8 d. per sheet signing, seal 7 d. warrant 2 s. 4 d. officer for levy 10 s.; the sheriff on the first distringas levies 40 s.; on the *return day* call for a return of same; when he has returned it, no appearance being entered, you then issue an *alias*, and move in the treasury chamber at *Westminster*, before the sitting of the court, to increase the issues; the judges will increase the issues to the value of the debt and costs, if the debt be but small. Draw up the rule with the secondaries, and give same to the sheriff to levy the issues with the *alias distringas*, pay 5 s.

If there be occasion for a third distringas, then proceed by getting a return from the sheriff as before; move the court for increase of issues also as before, and so on to a fourth, if the whole amount of the debt and costs are not returned and no appearance. If you have sufficient, then move to sell the issues.

Appearance.

Appearance.

A *peer* or *member* has four days to appear to the writ of summons, *after the return day* of the writ; and in default, a distringas issues: if there be a distringas, then he must appear *on the return day*; or in default, an *alias* issues; and if he does not appear *on the return day*, a third distringas issues. If he appears, he does it as in common cases, with the *filacer* of the county where the summons issues, and a memorandum is to be filed with a 2 s. 6 d. stamp. And after a levy of distringas's on him, he may apply on entering his appearance, for the issues to be returned him by the sheriff, which a judge will order, on his paying the costs of the contempt, and putting the plaintiff in the same situation.

Suits may be prosecuted against peers,

By Stat. 10 G. 3. c. 50. Any person shall and may commence and prosecute any action or suit,

In any court of record, or court of equity, or of admiralty, and in all causes matrimonial and testamentary, against any peer or lord of parliament of Great Britain, or against any of the knights, &c. of the House of Commons of Great Britain, for the time being, or against their or any of their menial servants, or any other person intitled to privilege of parliament; and no suit, action, &c. shall be staied, by or under colour or pretence of any privilege of parliament; provided that nothing shall extend to subject the person of any of the knights, citizens, and burghesses, or the commissioners of shires and burghs of the House of Commons of Great Britain, for the time being, to be arrested or imprisoned, upon any such suit or proceedings. Sect. 2.

&c. and their servants.

The persons of peers, &c. not to be arrested.

Their servants to be sued as common persons.

N. B. Servants of peers and members of parliament, by this act, deprived of every privilege they were intitled to from their respective lords and masters; and therefore may be prosecuted and arrested as common persons.

In the Common Pleas.

Michaelmas term, in the 34th year of the reign of King George the Third.

To the justices of our Lord the King of the Bench.

Middlesex, to wit, John Denn, by S. M. his attorney, complains of R. Earl of V. in a plea of trespass on the case; For that whereas (as in a common bill, according to the nature of the action), and therefore he brings his suit, &c. (leaving out the words in the common conclusion, "craftily and subtilly, to deceive and defraud the said John;") then, And hereupon the said John prays process of our Lord the King, according to the form of the statute in such case made and provided, to be made to him thereupon; and it is granted to him, &c. pledges to prosecute, John Doe and Richard Roe.

The form of a bill against a peer.

A memorandum on a 2s. 6d. stamp to be filed.

12 & 13 W. 3. c. 3. s. 2.

The sixteen peers of Scotland, by Stat. 5 Ann. 8. have the same privilege which the peers of England have; also all the rest of the peers of

Scotland have all the privileges of the peerage of England (except voting in parliament). 4 *Bacon Abr.* 229.

The christian
name and title,

If defendant be a duke, describe him thus: "*Complains of C. Duke of B.*;" and say in all the counts, "*The said duke was indebted,*" instead of "*the said C.*" In the *summons* and *distringas*, call him "*C. Duke of B.*"

It was objected in error, that this court could not hold plea against a member by bill; but it was held it might, and the judgment of C. P. affirmed, *Str.* 734.

The bill against a member, is a complaint in writing, describing the defendant as having privilege; and concludes with praying process to be made according to the form of the statute of 12 & 13 *W. 3. c. 3. s. 2.*

N.B. Put the
term.

Bill against a
member,

To the justices of our Lord the King of the Bench.

Middlesex, to wit, *John Denn*, by *S. U.* his attorney, complains of *Richard Fenn*, Esq.; having privilege of parliament, in a plea, that he render to the said *John* 100*l.* of lawful money of Great Britain, which he owes to, and unjustly detains from him; *For that whereas (as in other cases):* And therefore he brings suit, &c. And hereupon the said *John* prays process of our Lord the King, according to the form of the statute in such case made and provided, to be made to him thereupon: and it is granted to him, &c. Pledges to prosecute, *John Doe* and *Richard Roe*.

N. B. Leave out the words, "*craftily and subtilly, &c.*" in the common conclusion.

If an Irish peer,
how to style him
if in parliament,
otherwise he is
not protected.
2 *Inf.* 48.

If the defendant be an *Irish peer*, and a member of the house of commons here, describe him thus: "*James Connolly*, Esq.; commonly called, *James Lord W.*;" and instead of *James*, say, "*the said James Connolly*;" but the words, "*Having privilege of parliament,*" are not to be omitted, because the peers of that kingdom are considered only as *commoners* in this.

The

The privilege of a *peer* of this *realm* or *Scotland* commences from the writ of summons or date of the letters patent; and the privilege of a *commoner*, immediately upon his election. If defendant succeeds to a *peerage* after arrest, he will, on motion, be discharged. *Vide Dougl. 45. Vide 1 Black. Com. 165.*

Summons against a Peer.

George the Third, &c.
To the Sheriff of *Middlesex*, greeting: We command you, that you summon *R. earl of V.* that he be before our justices at *Westminster*, on *Wednesday* next after the morrow of *All Souls*, to answer to *John Denn* of a plea of trespass on the case; *For that whereas (to the end of the bill), to the damage of the said John of 50l. as it is said; and have there this writ.* Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

The like against a Member.

George the Third, &c.
To the Sheriff of *Middlesex*, greeting: We command you, that you summon *Richard Fenn, Esq.* (*having privilege of parliament*), that he be before our justices at *Westminster*, on, &c. to answer to *John Denn* in a plea, that he render to the said *John* 800 *l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him; *For that whereas (to the end of the bill), to the damage of the said John of 100l. as it is said; and have you there this writ.* Witness, &c.

X. W. H. H.
There may issue a testatum summons into another county, if goods, &c., cannot be distrained in the county where the venue is laid.

N. B. Make a *præcipe* for the filacer.

There need not be fifteen days between the teste and return.

It is said in the books that a *summons* and *distringas* should state the *whole bill*. But on looking into the *old entries*, I find no such thing. The *summons* and *distringas* there state "*to answer the plaintiff in a plea of trespass on the case,*" or as the nature

Memorandum.

nature of the action is, which is sufficient notice to defendant to compel an appearance in my humble opinion; for no advantage can be taken on this process in pleading, and an appearance cures the defect. It may be urged as a hardship on the filacer as he is paid 8*d.* per sheet for signing the process, but in answer to this, if the fee for the whole is legal, he may be paid for the whole length of the declaration. The short forms are used in the K. B. by original.

Distingas.

* R. earl of V.
by all,

No time is limited between
teste and return,
as these writs
are for contempt.

George the Third, &c. To the sheriff of Middlesex, greeting: We command you, that you detain Richard Fenn*, Esq.; (*having privilege of parliament*), by all his lands and chattels in your bailiwick, so that neither he, nor any one through him, put his hands thereon, until you shall have other command from us; and that of the issues thereof you answer to us, so that he be before our justices at Westminster, on next after

to answer to John Denn in a plea, that he render to him 800*l.* which he owes to, and unjustly detains from him; For that whereas (*to the end of the bill*) to the damage of the said John, of 20*l.* as it is said, and to hear judgment thereof, for his many defaults; and have you there this writ. Witness Sir James Eyre, Knight, &c. at Westminster, &c.

Make a *præcipe* for the filacer in common form.

Court may order
the issues to be
fold, &c.

The court may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff as the said court shall think just; and the surplus to be retained, until the defendant shall have appeared, or other purpose of the writ answered, provided when the purpose of the writ is answered, that then the said issues shall be returned; or if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon.
10 Geo. 3. c. 50. s. 3, 4.

That obedience may be enforced to any rule of his majesty's courts of K. B. C. P. or Exch. against any

any person entitled to privilege of parliament, by distress infinite, in case any person or persons, intitled to the benefit of such rule, shall chuse to proceed in that way, *sect. 5.*: and the last clause extends them to Scotland.

If the defendant neglects to appear on the return day of the *distringas*, a return thereof must be got from the sheriff, who returns issues of course to 10s.; pay 2s. upon which you sue out an *alias* in the same manner as the former, and a third, if necessary; then the plaintiff may move in the treasury upon the production of the return of the first, to increase the issues, which the court may order at discretion; the rules are drawn up at the secondaries; serve same, and at the same time "*shew the original rule.*" If the defendant appears, you may, upon the following affidavit, move the court for a rule to shew cause, "*why it should not be referred to one of the prothonotaries to tax the plaintiff's costs, of and occasioned by the writ of distringas and alias distringas issued in this cause to the sheriff of Middlesex, and also the costs of this application to the court, and why the said sheriff should not be directed to sell so much of the issues levied by him, by virtue of the said writs, as will be sufficient to answer the said costs when taxed, and why the said sheriff should not, with the monies arising from such sale, pay to the plaintiff or his attorney such costs, and return the residue of the said issues to the defendant, pursuant to the act of parliament in that behalf lately made and provided.*"

If he neglects to appear.

Give the affidavit to a serjeant; fee 10s. 6d. to move; draw up rule with the secondary, pay 9s. 6d.; serve copy on the defendant's attorney, make affidavit of the service, and of shewing the original; give brief to a serjeant, fee one guinea to make it absolute, then draw up rule absolute, and get an appointment with the prothonotary to tax; serve copy of rule and appointment; and when the costs are taxed, the sheriff, on producing the *allocatur* and rule, will pay them, or you

How to proceed on this rule.

Affidavit to
ground a rule
for the sale of
the issues.

you may move the court against him for an attachment.

A. B. of, &c. Gentleman, attorney for the plaintiff in the above cause, maketh oath and saith, That the plaintiff's cause of action is for work and labour done and performed by the plaintiff for the defendant, and for materials found and provided by the said plaintiff for the defendant, and that the said defendant was duly summoned by the sheriff of *Middlesex*, by virtue of a writ of summons issuing out of and under the seal of this honourable court returnable on next after last past, to appear in this honourable court, at the suit of the said plaintiff, as appears to this deponent by the return on the back of the said writ of summons made by the said sheriff of *Middlesex*, and that the said defendant not appearing to the same within the time limited by the rules of this honourable court, a *distringas* against the defendant's goods issued, on which the said sheriff of *Middlesex* cause to be levied and returned 40s. issues; and that the said defendant not appearing to such *distringas*, an *alias distringas* issued on the day of instant, returnable on next after on which the said sheriff, by virtue of a rule of this honourable court, levied and returned issues to the amount of 50l.

Distress ad infinitum.

If the defendant does not appear, you must continue distraining him till he does, and move to sell the issues for the costs as before directed.

If he appears,
then declare.

When he appears, then deliver a declaration in the same manner exactly as against an attorney, with a memorandum of the day the bill was filed, and a copy of the bill, adding pledges to prosecute. p. 572.

Want of a continuance in the
issue book delivered, may be
entered at any
time on the roll.

Proceedings by bill against a member which was of *Easter* term last, and in *Trinity* term last he pleaded the general issue, whereupon issue was joined *that* term; the *paper book* of the issue has been delivered, whereby the whole proceedings in this cause appear to be of *Trinity* term without any
continuance

continuance from *Easter* to *Trinity*, or any *alias prout patet*; which is irregular; this being a proceeding by bill of *Easter* term. Moved, that the issue as delivered be set aside for this irregularity. On shewing cause, court said, this is a nice objection, it is a mere matter of form, and we think the continuance or *alias prout patet*, are not necessary in the issue paper, it may be entered at any time on the roll. Rule discharged. *Wilkes v. Wood.* 2 *Wils.* 203. *M. 4 Geo. 3.*

N. B. Formerly peers, members, and bodies corporate, &c. used in *personal actions* to cast an *essoign*, but now it is become obsolete, and determined that it will not lie. *Cooke's Rep.* 8. *Symonds v. Mayor, &c. of Totness.* The same law determined in *K. B.* 2 *Term Rep.* 16. 2 *Str.* 1194. & *Pratt, C. J.* in 2 *Wils.* 164. says, *That casting essoins was a very obsolete practice, and a great abuse of the law, being an unnecessary delay of justice, and could not be cast by an attorney.* *Anson v. Jefferson.*

Cannot cast an *essoign*.

Peers and members are bound to plead within the time allowed to other defendants, and if the bill be not filed four days before the end of the term, they are entitled to an *imparlance*; provided they appear within the proper time, *viz.* four days after the return of the writ of summons: and the rest of the proceedings are as in common cases.

When to plead;

If a commoner, held to special bail, moves to be discharged on a common appearance, the court will not grant a rule to shew cause on an affidavit only, but on attendance of the clerk of the crown, or his deputy, with the sheriff's return, then they will order the rule to go. 2 *Black. Rep.* 788. *Fenwick v. Fenwick, Esq.*

To be discharged on a common appearance, the return of the writ must be produced.

Proceedings to Outlawry.

IF the defendant is out of the kingdom, or absconds from being taken, the plaintiff may proceed to outlawry against him.

In what cases it formerly lay, and in what now.

It formerly only lay for *treason* and *felony*; but now by the statute 19 *Hen. 7. c. 9.* "Process of outlawry may be sued, as well in *actions upon the case*, as in *actions of trespass or debt.*" *Vide* 25 *Ed. 3. c. 17.* But lies in no case but where *capias* lies. 2 *Roll. Abr. 76.*

Outlawry in civil actions.

Outlawry, in civil actions, is considered as in the nature of civil process, to compel an appearance to the suit; or, if after judgment, to procure satisfaction. The forfeiture, though nominally to the King, yet in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, he pays all the costs, puts in sufficient bail, and does all he can to put the plaintiff in as good a condition as he would have been in originally; or, if after judgment, the outlaw pays the *debt and costs*, the court reverses the outlawry upon motion, without any writ of error.

If the action be laid in *London*, it is said the defendant will be sooner outlawed than in another county, in regard that between the teste and return of the exigent there must be five county days which are held every month, and the *hustings* in *London*, which answer the county days, are held every fortnight.

The method of proceeding how used.

This mode of proceeding is used as well where in an action against two, the one is arrested, and the other cannot be found, for you cannot declare separately, therefore the other must be outlawed and in order to take care that the bail of the one be not discharged at the end of the second term of the return of the writ; get a rule to declare against him, serve it on his attorney, and continue so to do from

from term to term till the other comes into court, or is outlawed.

There are two ways to proceed to outlawry in this court, the one by original *quare clausum fregit*, and the other by *special original*. If you proceed by the *first*, the defendant may, after he is returned outlawed, and the *exigent* filed, reverse the same without bail, he paying the plaintiff's costs, on entering of a common appearance. *Barnes 324. Abley, Esq. v. Stockwell and another.*

Two ways of proceeding.

The *original* must be tested after the cause of action accrued, and have fifteen days between the *teste* and return, as also the *capias*, *alias*, and *pluries*.

Original when to be tested.

How to proceed upon the original qua. claus. fregit.

To proceed upon the *common original quare*, &c. make a *præcipe* for the same, take it to the filacer, who will bespeak the original, and make out a *capias*, *alias*, and *pluries* (provided your cause of action has accrued time enough to *teste* your original back), sign and seal them, then leave them with the sheriff for a return of *non est inventus*; call on the filacer in the mean time for the original, who will procure it for you: get that also returned *nihil* by the sheriff. When the *pluries* is returnable, call on sheriff for same; then file a warrant of attorney for the plaintiff, and take the *pluries* to the clerk of the warrants, who will mark it (pay filing warrant 4d.). Then an *exigent* and *proclamation* is to be made out as after.

How to proceed upon an original *quare clausum fregit*.

Memorandum on a 2s. 6d. stamp.

How by special original Writ and Bail.

But if you mean to hold the defendant to bail, make an affidavit of the debt (*which must amount to 10l. or upwards, and be sworn before a judge, or the filacer of the county where the venue is, and filed with the filacer*), prepare *præcipe* for a *special original*, wherein you are to set forth the *degree*, *profession*, or *mysery* of the defendant, together with the *town or hamlet*,

How to proceed, if you are to hold defendant to bail.

hamlet, place, and county, in which he is, or was *capable* *versant*; thus,

Præcipe for special original.

Middlesex, to wit, If *Richard Fenn* make you secure, &c. then put by sureties and safe pledges, *John Denn*, late of *Westminster*, in the said county, hosier, that he be before our justices at *Westminster* on the morrow of *All Souls*, to shew, For that *whereas* [here set forth the whole declaration]. Wherefore the said *Richard* says he is injured, and hath sustained damage to the value of 100*l.* as it is said, &c.

A memorandum or minute is to be delivered to the filacer on a 2*s.* 6*d.* stamp for the plaintiff.

Take this to the filacer of the county where the venue is laid, who will receive the King's fine and curfitor's fee, and make out the *capias* and *alias*, which he signs, (pay 8*d.* per sheet, seal 7*d.* each,) leave them with the sheriff for a return of *non est inventus*; also call on filacer for the original, and get that returned with the sheriff. When these writs are returnable, get them from the sheriff's office, then take them to the filacer, who will make out the writ of *pluries*, seal it, take it to the warrant of attorney office, with the plaintiff's warrant of attorney, the clerk marks the writ, pay 4*d.* You will then leave it at the sheriff's office for a return, and afterwards apply for the return.

Teste and return.

N. B. The *capias* bears teste on the *quarto die post* of the original; the *alias*, the *quarto die post* of the *capias*; and the *pluries*, on the *quarto die post* of the *alias*; and each writ is to have fifteen days between the teste and return.

The form of the special *capias* is in my *Inst. Cler. K. B.* 5 edit. p. 498, 499.

Warrant of attorney.

Middlesex, (ss.) *Richard Fenn* puts in his place *S. U.* his attorney, against *John Denn*, late of, &c. hosier, in a plea of trespass on the case.

No *pluries capias* received, till stamped by the clerk of the warrant.

No *exigent* shall receive any *pluries capias* in order to make an *exigent* or *proclamation* thereon before the same be signed or stamped by the clerk of the warrants, or his deputy, to the end it may appear that the warrants of attorney therein are duly filed. *Rule Hil. 2 & 3 Jac. 2.*

Ever

Every attorney shall file his warrant of attorney of the term wherein any *exigent* is awarded, upon pain of 40 s. such warrant to be filed upon or before the *essoign* day of every *Trinity Term*, and within twenty-one days after the end of every other term. R. H. 14 & 15 Car. 2.

Warrant of attorney to be filed same term with the *exigent*.

After the *pluries* is returned by the sheriff, take it to the *exigenter*, Mr. *Meddowcroft*, who will thereupon make out an *exigent* and proclamation, which get sealed; take the *exigent* to the sheriff's office, if in *Middlesex*, or to the secondary's office, if in *London*, and leave it there to be perfected, and the proclamation you send down to the sheriff of that county, wherein the defendant is named in the writ, for him to be proclaimed, whether it be a county palatine, or other franchise in England or Wales. 31 Eliz. c. 3.

Where to take the *pluries*.

The *exigent* is to bear *teste* on the *quarto die post* of the *pluries capias*.

The *exigent* requires the sheriff to cause the defendant to be demanded or exacted in five county courts successively, to render himself, and if he does, then to take him, as in a *capias*; the proclamation commands the sheriff of the county wherein the defendant dwells or last dwelt, to make three proclamations thereof, in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. 6 H. 8.

What the *exigent* and proclamation require.

4. 3 Eliz. c. 3. This last writ is to bear *teste*, and return, the same as the writ of *exigent*.

Where any *exigent* shall be awarded, a writ of proclamation shall be made out of the same *teste* and return of the writ of *exigent*, directed to the sheriff of the county where the defendant at the time of the *exigent* awarded shall be dwelling, which writ of proclamation shall contain the effect of the same action; and the sheriff to whom the proclamation shall be directed shall make three proclamations, viz. one in the open county court; one other at the general quarter sessions of the peace, in those parts where the defendant,

Three proclamations shall be made in every action personal, wherein any writ of *exigent* shall be awarded, &c. and same *teste* and return as the *exigent*.

defendant, at the time of the exigent awarded, shall be dwelling; and one other one month at least before the quint. *exact.* by virtue of the writ of exigent, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling, at the time of the exigent so awarded; and if the defendant shall be dwelling out of any parish, then in such place as aforesaid of the parish in the same county, next adjoining to the place of the defendant's dwelling, and upon a Sunday immediately after divine service and sermon, if any there be, if none, then after divine service. All outlawries pronounced, and no proclamation awarded and returned according to this statute, are void. *Stat. 31 Eliz. c. 3. f. 1.*

Sheriff to take
12d.

The sheriff for making the proclamation at or near the church door shall have 12d. *Same Stat. Sect 1.*

Who is to make
out proclama-
tion.

The officer in whose office the exigent shall be taken, shall make out a proclamation, and shall take no more for making such writ of proclamation, and entering it on record, than 6d. *Stat. 6 H. 8. c. 4. f. 3, 4.* According to the provision of the *Stat. 31 Eliz.* all attornies are to be careful that writs of proclamation be delivered, and sheriffs to take care duly to execute the same. *Rule Mich. 1654.*

The exigenter keeps the *pluries*, the *copias* and *alias* you may keep yourself.

If not five
county days, or
hustings between
the teste and re-
turn of the exi-
gent, you must
have an allocat-
ur.

If there happen not to be five county days between the teste and return of the exigent, get a return thereof, and apply to the exigenter's office for an allocatur, in order to bring in the five county days (*and the like must be in London for want of hustings*); for though the hustings in London are once a fortnight; yet it often happens, that there are not five hustings between the teste and return of the exigent. Seal the allocatur, and then carry and leave it at the secondaries office (*if in London*), to the proper sheriff, to be returned; and when the allocatur is returned with the other hustings, count

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county days thereon, to make five, and the proclamation returned with three proclamations indorsed thereon, then defendant is outlawed.

But if any county day be past between the last of the former county days and the return, no *allocatur* shall issue; but you must have a new exigent, for the demand of the party must be at "five county courts successively, held one after another, without any court intervening." 2 H. P. C. c. 205. And all the writs must follow one another, and no term to elapse between the *capias*, *alias*, *pluries*, *exigent*, or *allocatur*.

No *allocatur* can issue, if there is any county day past.

If the defendant does not put in and perfect special bail, at the return of the *exigent* or *allocatur* (or file common appearance with the filacer of the county, on the common original, *quare clausum fregit*) the proclamation is to be filed with the *custos brevium*; then take the *exigent* and *allocatur* to the clerk of outlawries, at the attorney-general's, who will make out a *special capias utlagatum*, which is to extend the goods and chattels, lands and tenements, of the defendant, and to take his body also; if he be taken, he must put in and perfect bail before he can be released (provided there be an affidavit of the debt filed); if his goods, &c. be taken, get the sheriff to take an inquisition thereon, but no notice is requisite to be given to the defendant. Produce witnesses before the sheriff to prove deeds, or any other things taken, that they are defendant's, and an appraiser who has made appraisement thereof to prove the value. As soon as the *capias utlagatum* is returnable, get it from the sheriff; make a copy for yourself, then take it to the clerk of the outlawries, who will transcribe and transmit it into the exchequer; speak to your clerk in court, and he will then issue out a *venditioni exponas*, directed to the sheriff, to sell the goods and chattels appraised and bound upon the inquisition.

Capias utlagatum is the next writ that issues after the return of the defendant outlawed on the *exigent*.

How to proceed before the sheriff.

If the plaintiff gets a friend to take them at the appraised value, pay the money to the sheriff, who will make a bill of sale of same: or if leases are taken

If a friend takes them at appraised value.

taken in possession, he will assign the same, and return the *venditioni exponas*, which is filed with your clerk in court.

If debt does not exceed 50*l*.

If the debt does not exceed 50*l*. the court of Exchequer, on motion, will order the money to be paid to the plaintiff (*provided his debt and costs amount to that sum*), upon reading the return of the *venditioni exponas*.

Petition, &c.

If the debt is above 50*l*. then prepare a petition to the lords of the treasury, "*praying that the money levied, and in the hands of the sheriff, may be paid to the plaintiff, towards satisfaction of his debt and costs.*" A certificate of the transcript must be made by the clerk in court under the petition, which leave at their office (*a fee extra is requisite for expedition*); their answer is, a reference to Mr. Chamberlain, their solicitor of *Lincoln's Inn*, who will with great expedition, on request, order you to appear before him to make out the plaintiff's demand; he will require an affidavit of the plaintiff of that demand, sworn before a judge, together with an affidavit of his having paid his solicitor the costs, as by the bill of costs annexed. *N. B.* If the action be upon *notes, bills, or other securities*, he will require them to be produced before him, and upon his report what there is due for the debt, and perhaps he may report the costs (*for it is discretionary, they being given by the lords*); then file same with the clerk of the treasury, and get him to procure the king's sign manual, for the attorney-general to consent on your motion, "*that the money may be paid over to the plaintiff.*" After the king's sign manual is obtained, give brief to counsel, with 10*s*. 6*d*. to move the court of Exchequer, "*that the money returned upon the venditioni exponas, by the sheriff of Middlesex, be paid to the plaintiff.*" Also give brief to the attorney-general "*to consent;*" pay him 2*l*. 2*s*. clerk 2*s*. 6*d*. And, on such motion and consent, the court will order it to be paid accordingly.

The clerk in court then will draw up the order, and seal a *subpœna* at the same time, for the sheriff to pay the money to the plaintiff forthwith, which plaintiff may demand at the sheriff's office, and if not paid, may move for an attachment against him.

George the Third, &c. To the sheriff of *Middlesex*, greeting: We command you, That you cause *Richard Fenn*, late of *Westminster*, in your county, merchant, to be demanded from (*if in London say, "husting to husting"*) county court to county court, until, according to the law and custom of our kingdom of *England*, he be outlawed, if he does not appear; and if he does appear, then take him and safely keep him; so that you may have his body before our justices at *Westminster*, in eight days of *Saint Hilary*, to answer to *John Denn* of a plea; For that whereas (*here insert the whole præcipe*) to the said *John* his damage of 60*l.* as it is said; and whereupon you did in last past (*the return of the pluries*), make return to our said justices, that the said *Richard* was not found in your bailiwick; and have you there this writ. Witness, &c.

Exigent.

To be signed by the exigenter; pay him according to length, and seal 7*d.*

George the Third, &c. To the sheriff of *Middlesex*, greeting: Whereas by our writ, we lately commanded you, That you cause *Richard Fenn*, late of *Westminster*, in your county, merchant, to be demanded from county court to county court (*if in London "from husting to husting"*), until, according to the law and custom of our kingdom of *England*, he be outlawed, if he shall not appear; and if he should appear, then that you should take him and keep him safe, so that you might have him before our justices at *Westminster*, in eight days of *Saint Hilary*, to answer *John Denn* in a certain plea of trespass on the case, to the damage of the said *John*, of 60*l.* as is said; We command you, that according to the statute made in the thirty-first year

Proclamation.

of the reign of *Elizabeth*, late queen of *England*, you cause the said *Richard* to be proclaimed three several days, according to the form of the said statute, one of which proclamations to be made at or near the most usual church door of the parish where the said *Richard* is an inhabitant, that he render himself to you, so that you may have his body before our justices at *Westminster*, at the aforesaid time, to answer the said *John* of the plea aforesaid; and have there this writ. Witness, &c.

To be signed by the exigenter, pay sealing 7 d.

A *capias utlagatum* cannot be sued out after the death of the defendant. *Bristow & al. v. Dickson. Cooke's Rep.* 36. In this case the writ was tested after the death of the defendant.

Forfeiture.

A man outlawed in a personal action, forfeits his goods and chattels, 1 *Salk.* 305. term for years, 2 *Roll.* 806. l. 43. But it shall be for the benefit of the party. Also the profits of his freehold lands, 2 *Roll.* 807. Copyhold not liable. *Park. Rep.* 190.

Special *capias*
utlagatum.

George the Third, &c. To the sheriff of *Middlesex*, greeting: We command you, That you omit not by reason of any liberty in your bailiwick; but that by the oath of good and lawful men of your county, you diligently inquire what goods and chattels, lands and tenements, *Richard Fenn*, late of *Westminster*, in your county, merchant, hath or had in your bailiwick on the day of last past, or at any time afterwards, on which day he was outlawed in your county, at the suit of *John Denn*, in a certain plea of trespass on the case, to the said *John Denn*, his damage of 160*l.* as you have returned to our justices some time since; and by their oath cause the same to be extended and appraised according to the true value thereof; and what you find by that inquiry take into your hands, and keep safe, so that you answer to our justices the values and issues thereof; and having so extended and appraised the same, what you shall have done therein, make known to our justices

justices at *Westminster*, in fifteen days of *Easter*, distinctly and plainly under your seal, and the seals of those, by whose oath you shall have made the extent and appraisement, and for that the said *Richard* conceals himself, and runs up and down from place to place in your county, in contempt of our justices, and in prejudice of our crown, as we are informed; We command you, that you take the said *Richard* wheresoever he be going in your county, as well within a liberty as without, and keep him safely, so that you may have him before our justices at *Westminster*, at the aforesaid time, to do and receive what our said court of the Bench, shall in this case determine; and have you there this writ. Witness Sir *James Eyre*, Knight, &c.

When the inquisition is returned by the sheriff, a transcript of the outlawry and inquisition is returned into the *Exchequer*, and thereupon if any debt be returned due from any one to the outlawed, on application to the *Exchequer*, a *sci. fa.* issues to such person "to shew cause why the king should not have such sum so found due on the inquisition to the outlawed;" for when the inquisition has returned the outlawed to be possessed of any goods or lands, the property of those goods belong to the king, since the outlawed being out of the king's protection, cannot enjoy any thing; and the profits of the land are to be seized into the king's hands; but the lands themselves are not forfeited, unless it be in capital cases; but in other cases, the profits are seized whilst the party continues outlawed; and therefore the transcript of this record is sent into the *Exchequer*, that the court of ordinary revenue may have it in charge; but the court of *Exchequer* usually grant a *custodiam* to such person as sued out the outlawry. *Hard.* 422. *Carth.* 441. *Yelv.* 19. 2 *Vern.* 314.

When inquisition is returned, if there are debts of the outlaw, *sci. fa.* must issue, &c.

If the defendant be taken upon the *capias utlagatum*, the plaintiff cannot declare against him. *Gro. Eliz.* 706, for the process is determined.

To the right honourable the Lords Commissioners of his Majesty's Treasury.

The humble petition of A. B.

Sheweth,

Petition to the lords.

That *Richard Fenn*, late of *Westminster*, merchant, being justly indebted unto your petitioner in the sum of 50*l.* upon a promissory note of hand, bearing date the 22d of *June* 1792, and also in 50*l.* for goods sold and delivered to the said *R. F.* your petitioner was obliged to outlaw him for the recovery thereof.

That a writ of special *capias utlagatum* having issued against him, out of his majesty's court of Common Pleas at *Westminster*, at the suit of your petitioner, an inquisition was taken thereon by the sheriff of *Middlesex*, whereby certain goods and chattels to the value of 150*l.* [*here set forth the substance of the inquisition*] were by the said sheriff seized and taken into his majesty's hands; which writ and inquisition being transcribed into his majesty's court of Exchequer at *Westminster*, a writ of *venditioni exponas* duly issued out of the said court, whereon the said sheriff hath returned, that he has, by virtue thereof, sold the goods and chattels in the said writ mentioned, for the sum of *l.* being the dearest price he could get for the same; which monies he had before the barons of the King's Exchequer, at the day in the said writ mentioned, ready to be paid to his majesty's use.

That your petitioner has been at great expence in the said proceedings; and as his majesty is not concerned in interest, but his name only made use of by your petitioner, for the recovery of the said debt;

" Your petitioner therefore humbly prays your
 " lordships, that his majesty's attorney-
 " general may be authorised to consent on
 " behalf of his majesty, that the sum of
 " 125*l.* may be paid to your petitioner to-
 " wards

“wards satisfaction of the said debt and
“costs.”

And your petitioner shall ever pray, &c.

These are to certify, That in term, in the
thirty-fourth year of the reign of his present ma-
jesty King *George the Third*, a transcript of an out-
lawry was returned and filed in this court against
Richard Fenn, late of *Westminster*, in the county of
Middlesex, merchant, outlawed in *Middlesex*, at the
suit of *J. D.* in a plea of trespass on the case; by
which transcript it does appear, that several goods
and chattels of the said *Richard Fenn* were seized
into his majesty's hands by ———— esquire,
and ———— esquire, then sheriff of the
said county of *Middlesex*, by virtue of a *special capias*
outlawum, in the said transcript specified: *And I*
further certify, That a writ of venditioni exponas has
issued, for selling the said goods and chattels so
seized, whereon the said sheriff hath returned, that
he hath sold the same for the sum of *l.*

Certificate of the
clerk in court.

In the Common Pleas, { *John Denn*, Plaintiff,
and
Richard Fenn, Defendant.

John Denn, of, &c. maketh oath and saith, That
the above-named *R. F.* is justly and truly indebted
unto this deponent in the sum of *125l.* according
to the annexed account, and for costs paid to Mr.
G. C. this deponent's solicitor, in prosecuting the
outlawry in this cause against the said *R. F.*

Affidavit.

The order for payment of the money, and the
subpoena, are made out together by the clerk in
court.

If the goods of the person outlawed be taken by
the sheriff, and after the outlawry is reversed by
writ of error, the defendant shall be restored to the
goods again, because the sheriff was not compel-
able to sell those goods, but only to keep them to
the use of the king. 5 Co. 90. 1 Roll. Abr. 778.
Cro. Eliz. 278. 2 Jon. 101.

If goods be taken
after outlawry
reversed, defend-
ant shall be re-
stored to them.

If

If sale is made, then he shall have the produce.

If a sale be made of the goods under the *capias utlagatum*, the defendant will be entitled to the monies arising by such sale, after deducting the expences and fees; if a term is sold, he shall only be intitled to the money arising by the sale. *Cro. Eliz.* 278. *Eyre v. Woodfine.*

Defendant cannot be taken on a Sunday.

The defendant cannot be taken on a Sunday upon a *capias utlagatum*, *Stat. 29 Car. 2. c. 7.* though the court will not attach the sheriff, but leave the defendant to his remedy given by the statute. *Osborne v. Carter. Barnes 319.*

Of appearing to supersede the Exigent, and reversing the Outlawry upon the Common Original quare, &c. or where no Bail is required.

Of appearing, &c.

If the defendant has notice of the exigent, he may apply to Mr. Meddowcroft, the exigenter, who will make out a *superfedeas* thereon; pay 9s. 4d. signing, seal 7d.; leave the same at the sheriff's office, pay, allowing 2s. 4d.; and there is no appearance entered with the exigenter, the *superfedeas* being made out by him, is held a regular appearance. *Barnes 319. Peach v. Wadland.*

N. B. By the practice of this court, the defendant has till the *quarto die post* to appear to the exigent, *Rep. & Cas. Pract. C. P. 28. Colt v. Hall;* so that a *capias utlagatum* cannot be made out till the day after the *quarto die post* of the exigent.

If outlawed, may reverse at his own expence on common appearance,

If the defendant be returned outlawed, and the exigent filed, he has a right to reverse same at his own expence, on entering a common appearance and payment of costs, *Barnes 324. Ashley v. Stockwell,* which may be done in term time by motion in the Treasury; in vacation, on application to a judge for a summons for that purpose; and on delivering the order and receipt for the costs taxed, Mr. Lickbarrow enters the reversal. But if the outlawry is transcribed, costs must be paid to the time of the reversal, *ibid.*

The judgment of outlawry appeared to be entered after the plaintiff's death: and the *capias utlagatum* issued without a revival of the judgment. Rule abs. to set aside *cap. utlagatum*. *The King v. Manry. Barnes 125. Brown. breve jud. 42.*

Outlawry entered after death of plaintiff, bad.

Of appearing to supersede the Exigent before Outlawry, and reversing the Outlawry on a Special Original, where an Affidavit has been made of the Debt.

If the defendant has not been outlawed by the sheriff, "or the exigent has not been signed," he may, by applying to the exigenter, put in special bail, who fills up the bail-piece, and takes the bail to a judge, and notice must be given of same, and they must justify, afterwards he issues a writ of superseas, which is to be left with the sheriff.—*N. B.* The notices are the same as in other cases.

Bail to the exigent.

But if it be bail on the *capias utlagatum*, the defendant's attorney must apply to the clerk of the outlawries for an extract of the writ, and take same to Mr. Lickbarrow, who will fill up a bail-piece for that purpose, and attend with the bail to a judge, give notice, and afterwards justify same; draw up a bill for the allowance, then apply for a summons, shew cause why, upon payment of the costs, the outlawry should not be reversed; and upon producing the rule to a judge, that the bail are perfected, he will grant an order.—*N. B.* The costs must be forthwith paid, and receipt produced to Mr. Lickbarrow, so as to entitle him to make out a superseas, and the entry of the reversal; pay him about 2l. 4s. 10d.

The like to the cap. utlagat.

After he is returned outlawed, he cannot reverse the outlawry without bail, who are to be absolutely bound to pay the money without power to render the principal in their discharge. *Challing v. Fox. Barnes 326. 31 El. c. 3. f. 3. 4 & 5 W. & M. 18. f. 4. 3 Burr. 1920. 1 Wils. 3.*

Bail are absolute for the debt upon the return of outlawry.

Easter

Easter Term, in the 21st Year of the Reign of King George the Third.

New rule respecting bail before *superfedeas*.

Where an affidavit of the debt is made, no *superfedeas* to issue until bail be put in.

Whereas, as the law now stands, a suitor, in his cause of action shall amount to the sum of 100 and he doth proceed to arrest the person pursuant to the statute, and the course of the court, and the defendant is thereupon arrested, there can be no appearance but by putting in *special bail*. And where a practice hath prevailed in this court, where the defendant absconds, to avoid being arrested, and cannot be arrested, although all possible endeavours have been used for that purpose; that nevertheless before he is actually outlawed, he may obtain *superfedeas* on a common appearance: which practice originally obtained when the defendant was liable to be arrested, without a previous affidavit of the cause of action; but that being now necessary by law, it is unreasonable that the defendant should derive such advantage from his own fraudulent conduct. *This court doth therefore order*, That from the first day of *Trinity term* next, where the defendant shall abscond to avoid being arrested, and cannot be arrested, (although the plaintiff shall, bona fide, have used his best endeavours for that purpose,) a *superfedeas* shall not be issued to "stay the proceedings to an outlawry, unless the defendant shall first put in *special bail*:" and that the writ of *superfedeas* thereupon issued, in case *special bail* shall not afterwards be perfected according to the course of the court, where *special bail* is required upon arrests, shall be void, and of no effect to stay the plaintiff's proceedings to outlawry, but the same may be gone for with, from the time of such default, as if no appearance had been entered, or *special bail* filed, shall not be deemed irregular or erroneous, nor shall any means of such interruption of the proceedings, by putting in *special bail*, and not afterwards putting in *special bail* as aforesaid,

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Rules of Court respecting Outlawries.

It is ordered, That no outlawry after the death of the plaintiff shall be reversed, without the defendant's appearing and putting in special bail (if the action so requires) to the executor or administrator of the plaintiff, or to the husband and wife, in case where the wife, whilst a *feme sole*, sued the defendant to an outlawry before marriage. Provided that the plaintiff's attorney to the writ of *exigent* or *apias utlagatum*, do within fourteen days after notice to him given, of the defendant's intention to reverse the outlawry (*deliver**) the name or names of the executor or administrator of such plaintiff or plaintiffs deceased to the proper prothonotary. *Rule*

No outlawry after the plaintiff's death to be reversed, till appearance or bail.

* *deliver* is not in the rule.

2 Jac. 2.

By rule T. 33 Car. 2. No defendant who shall be outlawed, and who shall appear and reverse the outlawry, shall, upon such reversal, pay for costs to the plaintiff any sum of money exceeding the usual costs of the *exigent* in this court, together with the fine to our Lord the King, upon the *original writ*, if any was paid; and that all further costs shall be repaid until the time of signing judgment for the plaintiff. And that every defendant so outlawed and reversing such outlawry, if the plaintiff shall not proceed thereupon within two terms next after notice of the reversal thereof, shall have costs to be taxed by the prothonotary. *Ibid.*

Upon reversing outlawry, defendant shall pay nothing exceeding the usual fees, &c.

If plaintiff proceed not in two terms, defendant to have costs.

And for the better execution of the process of outlawry, to be made and issued by and out of this court, and the prevention of divers abuses by neglect of the same, and for the better regulating of the reversal of outlawries, *It is ordered*, That upon every writ of *exigent*, which shall be sued forth of this court, from and after this term, if a *superseas* be not put in thereunto at or before the day of appearance thereof, that no *superseas* shall by any sheriff be allowed to any such writ, until the defendant shall have paid unto the plaintiff, or his attorney, or left in the court, with one of the prothonotaries

For better execution of process of outlawry.

No *superseas* after the return of the writ till costs are paid.

thonotaries thereof, the full and just costs of suit therein. *R. T. 2 Jac. 2.*

Special bail
where the sum
or damages
amount to 10l.

And that upon reversing all and every outlawry, the party defendant which reverseth the same shall, before the reversal thereof, or any *superfedeas* made thereunto, give special bail, if the sum of money, or damages expressed in the original whereupon the *exigent* is awarded, shall amount to the sum of 10l. or upwards, and pay to the plaintiff or his attorney, or leave in the court for him or them, the full and just costs of suit to the exigent as aforesaid. *Ibid.*

Where further
costs shall be
taxed and paid
before certificate.

And where the plaintiff, by virtue of such outlawry, hath taken an inquisition, and extended into the king's hands the goods, chattels, lands, or tenements of the outlawed person, and returned the same into the Exchequer, such further just and reasonable costs shall then be taxed by the prothonotary, and likewise paid to the plaintiff or his attorney, or left in court for him or them, as the plaintiff hath been at in taking and prosecuting the said inquisition, before any certificate of such reversal shall be made by the clerk of the outlawries in that behalf. *Ibid.*

Sheriffs not to
enlarge out-
lawed persons
without *super-
fedeas*.

And for the prevention of the great and common abuse by sheriffs officers and bailiffs, for enlarging persons arrested upon *capias utlagatum*, before judgment, without a lawful *superfedeas* in that behalf first delivered unto him or them, that upon affidavit thereof, every person offending therein shall pay the sum of 40s. to the party grieved, who shall have an attachment of course against such Sheriff's officer, bailiff, or party offending, for payment of the same; and the party or parties so offending shall likewise undergo such other punishment as by the court shall be thought fit. *Ibid.* Vide *R. M.* 1654.

Sheriffs not to
discharge any
person taken
upon outlawry
without *super-
fedeas*,

No sheriff, under-sheriff, &c. shall set at liberty any person taken upon any writ of *capias utlagatum*, nor discharge the lands or goods of any person outlawed, by them seized upon any writ of *capias utlagatum*,

lagatum, without a lawful *superfedeas* under the seal of the court to them delivered, for such discharge, Rule H. 15 & 16 Car. 2. That no such *superfedeas* be made or issued out of this court, by any officer, clerk, attorney, or minister of the same, without sufficient bail being first taken according to law, and former orders and usages of this court. *Ibid.*

Where any outlawry shall be transcribed into this court, and process made out thereupon, and afterwards such outlawry shall be reversed, before any judgment shall be entered for removing the king's hands, and the party outlawed restored to his possession, the prosecutor of such outlawry shall be paid such costs as shall be taxed by their majesties remembrancer, or his deputy for the proceedings in this court. Made a rule of this court. T. W. & M.

Order upon outlawries transcribed into the Court of Exchequer before reversal, costs to be paid.

By Stat. 13 W. 3. Stat. 2. c. 2. s. 4. No sheriff nor under-sheriff, nor any officer or minister, shall discharge any person or persons taken upon any writ of *capias utlagatum*, out of custody, without a lawful *superfedeas* first had and received for the same. *Vide R. Hil. 15 & 16 Car. 2. s. 4 & 5 W. & M. c. 18. s. 4.* It is thought the sheriff, although this statute relates to the King's Bench, may take bail upon the *capias utlagatum* in this court (*vide 2 Cromp. 62.*) without a *superfedeas*, to appear, and as the statute directs.

No sheriff to discharge defendant upon *ca. utlagat.* until he receives a *superfedeas*.

Cases relating to the Appearance to the Exigent, and reversing Outlawry without Error.

A writ of *superfedeas* to an *allocatur* to the exigent, could not be sealed in the morning of the day whereon the *allocatur* was returnable, it being an holy day, but was sealed and brought to the sheriff's office in London, about an hour after the defendant was returned outlawed. The proceeding was by special original, which required bail. Motion and rule was to shew cause why the defendant should not

Proceedings staid on the outlawry on payment of the debt and costs.

Outlawry in the same county held good.

Proceedings staid on the exigent, defendant becoming a prisoner in the Fleet.

Outlawry commenced during defendant's residence in Ireland reversed.

Though defendant appears publicly, yet keeping out of the way of arrest, may be outlawed.

If defendant goes beyond sea, after teste of exigent, may be outlawed.

Outlawry not special, may reverse on common appearance.

not have leave to supersede the *exigent*, on payment of costs. Ordered, That proceedings on the outlawry be stayed, on payment of debt and costs within a month; but in default, the rule to be discharged, and plaintiff at liberty to proceed on the outlawry. *Barnes 326. Challing v. Fox.*

Motion that plaintiff should reverse an outlawry at his own expence, for that the defendant being visible and daily to be arrested or served with process, (of which affidavits were made,) and living in London, was outlawed there; motion denied: but the court said, if defendant had been outlawed in another county, they would have ordered the plaintiff to reverse the outlawry and pay costs. *Hayes v. Longbotham. Cooke's Rep. 61.*

It appeared, that pending the *exigent*, defendant was a prisoner in the gaol for the city of York; for which reason, court ordered the outlawry to be reversed without costs, upon defendant's entering a common appearance. *Barnes 321. Hely v. Hewson.*

Outlawry commenced and prosecuted during defendant's residence in Ireland, shall be reversed without bail or appearance. *Barnes 325. Rilly v. O'Connor.*

Motion to reverse outlawry on *common clausum fregit*, at the plaintiff's expence, on affidavits of defendant's public appearance and dealings, sworn by themselves only. *Per cur.* Let the rule be enlarged till next term, that the plaintiff's attorney may in the mean time make satisfaction to the parties. *Barnes 320. Blunt v. Beale.*

If defendant goes beyond sea after the *teste* of an exigent, he may be regularly outlawed. *Barnes 321. Speed v. Barber.*

Where the outlawry is not special, defendants may reverse at their own expence, and payment of costs on common appearance; if before transcribing into the Exchequer, common costs to the *exigent*; if after costs, to the time of reversal. *Barnes 324. Ashley v. Stockwell.*

The

The court will not interfere in a summary way to set aside the outlawry for want of proclamation, but will put the defendant to his writ of error. *Barnes 323. Wiatt v. Parker.*

Court will not interfere to set aside outlawry for want of proclamation.

On motion to set aside an outlawry, the court held that the defendant's own affidavit of his being a visible person, without a like affidavit by his neighbours, is not sufficient foundation to set aside outlawry. *Bennet v. Skinner. Cooke's Rep. 151.*

Defendant's own affidavit of being visible.

Where the court see an unlawful proceeding they will not put the party to the expence of a writ of error, but will avoid circuitry and relieve him in a summary way. *Reilly v. O'Conner. Barnes 325.*

Court may relieve without error.

In debt on bond, by wife *dum sola*, the husband gone abroad and outlawed, and the wife, though she appeared publicly, is waived, the outlawry against her shall be set aside on motion; but goods taken on a *cap. utlagat.* must be deemed the husband's, though sworn to be her separate goods; and if she has an equitable right, she must apply in equity. *2 Wils. 127. Biscoe v. Kennedy and Wife.*

Debt upon bond by wife whilst sole, she and her husband outlawed, and her separate goods taken in execution; outlawry set aside as to the wife, but goods not restored.

If *feme sole* is waived specially on mesne process, and after exigent, and before outlawry marries, the court will not interpose in a summary way, as the marriage was after the exigent. *Barnes 321. White v. Dunster.*

Defendant feme sole waived specially, as a single woman, after exigent and before the out-

lawry married, court refused to interpose,

If a person procures another to be outlawed clandestinely, who appears openly and in public, the court will, on motion, oblige such person who procures the outlawry, to reverse the same at his own costs; but if it appears that the party outlawed had turned backward and forward between two counties, and that the person procuring the outlawry had dealt openly, and had been regular in sending down the proclamations to the sheriff of the county where he sometimes resided, the court will not interpose in this summary manner, but leave the party to his ordinary remedy by plea or writ

Clandestine outlawry.

of error. 2 Vent. 46. 2 Jon. 211. Comb. 191
2 Salk. 499.

Of reversing the Outlawry by Writ of Error.

A writ of error to reverse an outlawry in any civil case, is not often heard of now, as the party generally comes in and reverses it by motion, and satisfies the debt and costs, or justifies bail to appear to a new original; or if special bail is not required, enters a common appearance; in which case the outlawry is reversed of course before a judge, or in court, by confession of some trifling error in the proceedings, as the omission of any letter, irregularity in any of the process, want of proper addition, want of proclamation, want of filing the writ of proclamation, or, in short, any trifling matter whatever, which, in such cases, is usually confessed by the plaintiff. For as the intent of proceeding to outlawry is answered, either by the payment of the debt and costs, or by giving good bail to stand the event of the action, any objection to the reversal of the outlawry would be idle and nugatory.

How to apply for
for a writ of
error.

When a defendant, to reverse an outlawry, is obliged to sue out an actual writ of error, he must apply to the proper curfitor for the writ, who, on a *præcipe* being given him, will make out same.

When writ of
error is sealed.

When the writ of error is duly made out and sealed, the defendant must get it allowed by the court, on which allowance, the *allocatur* is subscribed.

On allowing the writ of error to reverse an outlawry, the defendant must enter into a recognizance to satisfy the condemnation money according to the statute of 31 Eliz. c. 3. s. 3. *Cooke's Rep.* 29.

If the error is in the *exigent* or *return*, or *allocatur*, or in the writ of *proclamation* or *return* thereto, (having first put in bail according to the statute), or in any of the proceedings, he gets a copy thereof, and spreads the whole record, and assigns the errors in this manner:

After-

Afterwards, to wit, on next after
in this same term, comes here the said *C. D.* by
his attorney, and immediately says, That
in the pronouncing of the outlawry aforesaid there
is manifest error in this, to wit, that the return of
the said writ of *exigi facias*, and also the said writ of
allocatur, are insufficient, invalid, and void in law,
therefore in that there is manifest error. There is
error also in this, that no judgment of outlawry,
upon the writ of *allocatur* aforesaid, is returned;
therefore in this there is manifest error (and so on
assigning the error or errors, as they happen to be).
And the said *C. D.* prays the writ of our lord the
King, to warn the said *A. B.* to be before our said
justices, to hear the record and proceedings afore-
said. And it is granted to him, &c.

Assignment of
errors.

If the plaintiff does not appear and confess the
errors, the defendant must sue out a *scire facias ad*
audiendum errores, &c.; and upon two *nibils* re-
turned, the court will reverse the outlawry of
course: but if the plaintiff comes in voluntarily, or
upon a *scire feci*, and does not confess the errors as-
signed, but joins in error, the defendant must make
up error-books, and proceed to argument and judg-
ment, as in other cases of error.

If plaintiff does
not appear and
confess error,
sci. fa. must
issue.

Of declaring after Outlawry reversed.

Upon the reversal or superseding of the out-
lawry, and the defendant does not pay the plaintiff
his debt and costs, he must proceed to declare, the
defendant having, upon reversing or superseding the
outlawry, put in special bail or filed a common ap-
pearance, as the case required, to appear to a new
original.

Of declaring
after reversal.

Upon appearing and superseding the exigent, the
plaintiff must declare within six or eight days after,
otherwise the defendant may give him a rule to de-
clare; and if no declaration comes in within the li-
mited time, the defendant may nonsuit the plaintiff
and have his costs taxed. *Compl. Soll. C. B.* 84.

Defendant may
give rule to de-
clare.

So if the defendant appear by *superfedeas*, and will not take a declaration, the plaintiff may have judgment against him by *nil dicit*. *Ibid.*

Plaintiff has to declare until the end of the second term.

But where a defendant outlawed caused the same outlawry to be reversed, the plaintiff has till the end of the *second term*, after reversing the same, and notice thereof given, to declare in ; but if he does not proceed within two terms next after notice of reversing the outlawry, the defendant shall have his costs to be taxed. *R. Tr. 33 Car. 2. C. B.*

The rule if no declaration.

Where the plaintiff does not declare within two terms after outlawry reversed, the defendant may give a rule to this effect, *viz.* That unless the plaintiff declares within four days after notice of this rule to him or his attorney given, he shall pay to the defendant or his attorney, costs to be taxed. *Pract. Reg. 271. Yer v. Cawsey.*

Nonpros.

The plaintiff cannot be nonprossed after the outlawry reversed, for he cannot lose that writ which, by reversal, is become void. *Pract. Reg. 271. S. C.*

The declaration.

The declaration, after reversal or superseding of the outlawry, has no need to be laid in the same county in which the former original was made. So held on demurrer. *3 Lev. 245.*

Venue.

Where the original and outlawry were in *London*, and on the reversal of the outlawry, the plaintiff declared in *Suffex*, on which it was insisted, that the original being laid in *London*, the plaintiff could not declare in the action in another county, though the cause of action was transitory ; but the prothonotaries certifying, that the course of the court was, that although the *original* be laid in *London* for the expediting the outlawry, yet when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory ; and the *Stat. 21 Jac. 1. c. 16. s. 4.* giving the plaintiff generally a power to commence a new action or suit, within a year after the outlawry reversed, the plaintiff may do it in this case, to warrant his declaration delivered within the course of

the court. And the plaintiff had judgment.

2 *Cromp.* 70.

By the 21 *Jac.* 2. c. 16. s. 4. it is enacted, That if in any action brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment of outlawry reversed, and not after.

And by the 31 *Eliz.* c. 3. s. 3. it is enacted, That before the allowance of any writ of error, or reversing of any outlawry be had by plea or otherwise, through or by want of any proclamation to be had or made, according to the form of the said statute, the defendant in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry. Vide rule *M. 12 Geo.* 1. in the very words of this act, respecting the condition of the recognizance of bail.

It is ordered, that in all cases where bail shall be filed on writs of error, such bail shall likewise be perfected within four days after exception taken thereto, or in default thereof, the clerk of the errors of this court shall nonpros such writs of error. *R. M.* 6 *Geo.* 2. *Reg.* 6.

Upon superseding the exigent, if plaintiff delivers a declaration, there should be a notice to plead, and a rule given to plead before judgment for want of a plea can be signed; and defendant has in such case the same time to plead as in other cases.

Barnes 271. *Swinby v. Woodhouse.*

If defendant be outlawed, and shall reverse same, the plaintiff may commence a new action within a year after such judgment of outlawry reversed, and not after.

Before allowance of a writ of error through or by want of a proclamation, bail must be put in and perfected.

Bail to be perfected in four days after exception.

Superseding the exigent, a declaration delivered, there must be a rule to plead given.

Proceeding to Outlawry after Judgment.

N. B. This means where the action is brought by original.

If you have judgment against a man that lurks in several counties, in regard you cannot regularly have execution against him in more counties than one at a time, the best way is to sue him to outlawry after judgment, for then you may take out as many writs of *capias utlagatum* against him as you please, and this for a small charge; besides, it saves the charge of reviving the judgment by *scire facias* after the year, and you have an *exigent* immediately after the return of the *ca. sa.* without an *alias* and *pluries*, and it is said, without a writ of proclamation.

The method of proceeding.

First, sue out a *ca. sa.* for the debt and costs, as the case is, into the same county where the action was laid, and get *non est inventus* returned by the sheriff; then carry same to the *exigenter* of the same county, who will make out an *exigent* thereupon, which must be delivered to the undersheriff, to be returned as other *exigents* are.

Proclamation also qu.

The *exigent* being returned, the clerk of the outlawries will make out a *capias utlagatum* into as many several counties as you will, either in *England* or *Wales*, *general* or *special*; and if the defendant be taken, he cannot be discharged without satisfaction to the plaintiff, or pardon of the outlawry, or reversing the same for sufficient error.

Superedeas upon reversal of outlawry.

George the Third, &c. To the warden of our prison of the *Fleet*, greeting; Whereas *H. W.* late of the parish of *St. George the Martyr*, in the county of *Middlesex*, gentleman, otherwise called *F. W.* of the parish of *St. George the Martyr*, in the county of *Middlesex*, gentleman, was lately, by virtue of our writ of *exigent*, to our sheriffs of *London* directed, outlawed in *London*, on *Monday* next before the feast of *St. Mark the Evangelist*, in the thirty-fourth year of our reign, at the suit of *H. W.* in a plea of debt for 90*l.*; which said outlawry, for certain reasons our justices at *Westminster* especially moving, is reversed and annulled; therefore we

command

command you, That you wholly forbear to seize into our hands, any of the goods or chattels, lands or tenements, of the said *F. W.* or in anywise to molest him, by reason of the outlawry aforesaid; and if you have seized into our hands, any of the goods or chattels, lands or tenements of the said *F. W.* by reason of the outlawry aforesaid, and not otherwise; that then you deliver unto the said *F. W.* without delay, the said goods and chattels, lands and tenements, and permit him the said *F. W.* without delay, to go at large, as you will answer the contrary at your peril. Witness, Sir *James Eyre*, Knight, at *Westminster*, the 28th day of *November*, in the 34th year of our reign.

George the Third, &c. To the warden of our prison of the *Fleet*, greeting: *Whereas*, we lately commanded you, That you should cause to be demanded *H. N.* late of *London*, Esq. from hustling to hustling, until according to the law and custom of our kingdom of *England*, he should be outlawed, if he did not appear; and if he did appear, then to take him and keep him in safe custody, so that you might have his body before our justices at *Westminster*, from the day of *Easter* last past, to answer to *H. P.* in a plea of trespass on the case, to the damage of the said *H.* of 130*l.* By virtue of which said writ, the said *H. N.* was afterwards outlawed, which said outlawry, for want of the return and filing of our writ of proclamation, is altogether void, and of no force nor effect in law: And *whereas* the said *H. N.* hath put in and perfected bail, to answer the said *H. P.* in the plea aforesaid; Therefore we command you, That if the said *H. N.* be detained in our said prison, under your custody, upon that, and no other occasion, then permit him to go at large, at the peril attending the neglect thereof. Witness, &c.

Superfedeas on reversal of outlawry, where bail is put in,

Of Proceedings by Original Quare Clausum fregit.

THIS practice is equal to the writ of *venire facias* in the court of Exchequer, and answers the same purpose; as the summons on the original may be left at the defendant's house: if he does not appear, then issues a *distringas* to levy on the goods 40s. and which may be made returnable any day in term, and need not have fifteen days between the *teste* and return. Before the statute of 19 H. 7. c. 9. which allowed the writ of *capias ad respondendum* in actions on the case, a practice was introduced in this court, of commencing the suit by an original writ of trespass, *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*, which by the old common law subjected the defendant's person to be arrested by writ of *capias*, and then afterwards by connivance of the court, the plaintiff might proceed to prosecute for other less forcible injury. This practice still continues, and saves the trouble of serving the defendant personally with a writ of *capias*; for if the defendant, upon the sheriff's summons, left at his house, and he having returned notice on the writ to the defendant, does not appear, a *distringas* issues against his goods; and if he does appear, the plaintiff may declare against him in any action he shall think proper, and, after judgment, purchase a *special original*, within the usual time, to warrant the proceedings, which will prevent the judgment being arrested or reversed. *Vide my Instr. K. B. 5 edit. 682.*

How to proceed.

The first step.

The first step necessary to be taken is, to make a *præcipe* for the curfitor of the county where defendant resides, (and a memorandum or minute

minute on a 2 s. 6 d. stamp, as on other writs,) as follows :

London, (H.) Original *quare clausum fregit*, for *Præcipe for the*
John Denn against *Richard Fenn*, late of *London*, original,
 officer, trespass at *London*, returnable before his
 majesty's justices at *Westminster*, on the morrow of
All Souls. J. Y. Attorney.

Take these to the curfitor for *London*, and he will make out and seal the original, pay 3 s. 6 d.; then get a summons from the sheriffs, pay 2 s. 4 d.; give it to your officer, and he will summon defendant, pay him 5 s. each defendant. On the appearance day of the return, search at the filacer's for the appearance; if no appearance is entered, get original returned by the sheriffs, and file same with the *custos breviarum*, pay 4 d.; he will give you a note of the name of the cause, and sheriff's return, which take to the filacer, pay 6 d.; if the return be return to the defendant, then make out a writ of *distingas*, in the following form; ingross same on a 2 s. 6 d. stamp parchment, make a *præcipe* for same, pay signing with the filacer 2 s. 6 d. seal 7 d. take it to the sheriff's office for a warrant to distrain defendant's goods to the value of 40 s.; give it to your officer, and if he levies, pay him 10 s.; get the *distingas* returned, then make out an *alias* thereon, adding the words *as formerly we have commanded you*, and if no appearance is entered on the return day, which may be on a day certain, and being signed and sealed as before, you may move to increase the issues in the treasury chamber, or by a serjeant, fee 10 s. 6 d. in court, the court will give 40 l. or 50 l. on the *second distingas*, provided the debt be large.—N. B. The rule should be left with the sheriff with the *alias distingas*, to warrant his levy. If you should not have sufficient returned, then get return of the *alias*, and if no appearance entered, make out a *pluries*; which being signed and sealed as before, move in the treasury chamber, or by a serjeant, for a fur-

a further increase of issues to the amount of the whole debt and costs; draw up rule, and deliver *pluries* with it to the sheriff who will grant him warrant to the officer to distrain to the amount. Which being done, get return of the *pluries*, and then move, if no appearance entered, to sell the issues, pursuant to the statute of 10 Geo. 3. c. 50 as in p. 587.

The act extends to all writs of *distringas* in general. *Burr.* 2726.

After appearance, the plaintiff may declare in what action he thinks proper, and proceed as in other actions. And the *venue*, if it be a *transitory action*, may be laid in any county, and declare as in other cases.

Distringas.

Fifteen days between teile and return not necessary.

George the Third, &c. To the sheriffs of London, greeting: We command you, that you distrain *Richard Fenn*, late of, &c. hosier, by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith until you shall have another command in that behalf from us; and that you answer us for the issues of the same, so that he be before our justices at *Westminster* in fifteen days of *Saint Martin*, to answer *John Denn* in a plea, wherefore with force and arms he broke the close of the said *John* at London, to the great damage of the said *John*, and to hear judgment for his many faults; and have you there this writ. Witness, Sir *James Eyre*, Knight, &c.

Præcipe.

London. *Distringas* for *John Denn* against *Richard Fenn*, late of, &c. hosier, trespass at London, returnable in fifteen days of *Saint Martin*.

Of Appearance.

Appearance.

If defendant appears to the original writ, he enters it with the filacer of the county where the original is directed; pay 2s. 6d.; and to prevent a *distringas* issuing, it must be done on the appearance day of the return of the original.

London.

London, (H.) Appearance for *Richard Fenn*, late
 London, hofier, at the suit of *John Denn*, to an
 original quare, &c. returnable in fifteen days of
 St. Martin. J. K. Attorney.

Præcipe for the
 appearance.

N.B. A memorandum or minute is to be deli-
 vered on a 2s. 6d. stamp at same time.

On a *clausum fregit* the plaintiff may declare in
 action. *Cooke's Rep.* 75.

Original returnable in one month from *Easter-*
Sunday 20th of *April*. The defendant not
 appearing *Wednesday* following, on *Thursday* a
stringas was issued. On that day defendant en-
 ded his appearance, and on *Friday* morning levy
 made of 40s. Rule why these issues should
 be repaid with costs, counsel alledging that
 defendant had till *Thursday* to appear. Court held
 must appear within four days of the return,
 which are inclusive both of the return day and
die post. Rule discharged. *Fano v. Coken.*

Both days are
 reckoned inclu-
 sive for appear-
 ance.

Black. Rep. 9.

You make the original in any county where the
 defendant has goods, and if he appears, you may
 over a declaration, changing the venue.

Venue.

Sergeant Bond obtained a rule to shew cause why
 proceedings should not be set aside, and the
 writs taken under the *disstringas* be restored, on an
 affidavit of the defendant's wife, that the defendant
 husband, before and at the time of commencing
 action, resided at Limerick in Ireland, where he
 went to continue; and that no person here had any
 authority to appear for him.

If a person lives
 in Ireland,
 though his wife
 lives in England,
 yet he cannot be
 sued in this court
 by a *quare clau-*
sum fregit.

Sergeant Runnington, against the rule, contended,
 as the *disstringas* had issued on a *quare clausum*
 writ, and was of course only to compel an appear-
 ance, the court would not set aside the proceedings,
 to compel the plaintiff to proceed in Ireland for
 recovery of his debt, the justness of which was
 denied; and that in a case so circumstanced,
 it would not be doing any injustice to presume,
 that the wife might be authorized to appear.

The

London,

The Court, however, made the rule absolute, on the ground, that as the defendant resided out of the kingdom, no process could issue to compel his appearance. That he could not be outlawed under such circumstances, the proceedings therefore were held to be irregular; but inasmuch as the plaintiff's debt was not denied, the court made the rule absolute without costs. *Webster v. McNamara*, Trin. 32 Geo. 3.

May have a *testatum distringas*, in another county, on return of the first *distringas*.

Infants.

BY the common law, a *male* or *female* is called an infant till the age of twenty-one years, *Lit. 171. b.*; but by the civil law, the age of fifteen years. *Ibid.*

An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation, or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. *Co. Lit. 172. a.* And if he brings the materials to the taylor, there is no need to aver that they were suitable to his quality. *Lat. 157.* Necessaries for an infant's wife, are necessaries for him, but not, if provided in order for the marriage, *Str. 168.*; and upon such contract by an infant, *assumpsit* lies. *Lat. 167. Jon. 146. Pal. 528.* If he gives a single bill for money upon such contract, it binds him. *1 Roll. 729. l. 20. Cro. Eliz. 920. 1 Lev. 86.* The court shall judge that things are necessary. *Cro. Eliz. 583.* If goods not necessary are delivered to an infant who under full age promises to pay, he is bound. *Str. 160.* An infant shall be charged for a trespass done by him. *Com. Dig. 3. v. 170.* So an infant of seventeen years of age shall be charged for malicious words. *Noy, 129.*

If a warrant of attorney be given by an infant and another, and judgment is entered up thereon, the court, on motion, will order the name of the infant to be struck out of the warrant of attorney, and set aside the judgment as against him. *2 Black. Rep. 1133. Motteux v. St. Aubin, and others.*

Motion to set aside an execution on a judgment which had been entered up under a warrant of attorney, on the ground that the defendant at the time of

In what cases he is liable, and what not.

If warrant of attorney be given by infant and another, and judgment thereon.

If an infant give a warrant of attorney for costs of a lawsuit.

of executing the warrant of attorney was an infant. *Serjeant Runnington* shewed cause on an affidavit which stated, that the defendant had formerly brought an action of trover against the plaintiff, which there was a nonsuit on the merits; for the costs of which this warrant of attorney was given by way of security to pay by instalments; which not being performed, judgment was entered up and execution sued out; and that since he had come of age, he had repeatedly promised payment. *S. 1217.* was cited, *Gardiner v. Holt.* *Per Cur.* An infant cannot be responsible even for costs; and the practice in ejectment proves it. Rule absolute. *Chambers v. Barrett.* *Trin. 32 Geo. 3.*

How infant to sue.

General admission.

If an action be commenced by an infant, he must sue by guardian or *prochein amy*, as the court please. *Co. Lit. 135. b. 2 Inst. 261. Crb. Car. 161.* And *prochein amy* is appointed by stat. 13 Ed. 1. c. 1. And a general admission of *prochein amy* to prosecute and defend all suits will do. *Vide Str. 30.* And it is said, defendant need not plead to the plaintiff shews the rule for his admittance. *Pract. Reg. 264.*; but now a copy of the rule is annexed to the declaration delivered. And the declaration states *per curiam specialiter admittit.* *1 Str. 173.* And the defendant's attorney may move to have the guardian's place of abode. *Vide 1 Will. 246.*

It is sufficient if a guardian be appointed before the declaration delivered.

If joined by others in suing in right of another, may be brought by attorney.

Yet if an infant be joined with others, in suing in the right of another, the action may be brought by attorney, for they all make but one person in law. *3 Cro. 377. 1 Vent. 102. 1 Roll. 287. l. 15.*

If he appears by attorney, it is error.

In all actions real, personal, or mixed, against an infant, if he appears by attorney, it is error. *8 C. 58. b. 9 Co. 30. b.*

Infant discharged from execution, having given a warrant.

Infant joined with his brother in a warrant of attorney which was entered up, and infant taken in execution, to procure his discharge, he alone gave

a second

a second warrant which was entered, and again taken in execution. Rule why the last judgment should not be set aside, and the warrant of attorney cancelled. Cause shewn was, that in equity the acts of an infant are often confirmed, such as an agreement to sell an estate, &c. But the court said, such acts of an infant are only voidable, and are allowed in equity to be confirmed, but not such as are actually void. A warrant of attorney is of the latter description, which the court cannot make good, though there appear circumstances of fraud on the part of the infant. Rule absolute without costs. *Saunderson v. Marr.* 1 H. Black. Rep. 75.

Of the Defence.

In an action against an infant, he must appear only by *guardian*, for he has not the knowledge of his own affairs, or to chuse a man to plead well for him; and may have an action against his guardian, if he loses by mispleading. 2 Roll. 287. 10. Dy. 104. b.

Infant and defendant.

In all actions, real, personal, or mixt, against an infant, if he appears by attorney, it is error. 1 Roll. 287. l. 20. 747. l. 10. Cro. Eliz. 569. Yelv. 111.

When error.

So if he be executor and joined with another of full age, he cannot defend by attorney, though he might sue. Str. 783. 2 Cro. 289. And such error shall be tried by the country, and not by inspection. Com. Dig. 5 V. 199.

Cannot defend with another of full age without a guardian.

If an attorney undertakes to appear for an infant, and enters it *per attornatum*, it may be amended, and made *per guardianum*. Str. 114. But there must be an expers undertaking, or it cannot be done, *Ibid.* 445.

And before plea, he must enter his appearance. Plaintiff sued by *capias*, entered an appearance according, &c. defendant pleaded general issue. Issue delivered with notice of trial, cause set down; but as the cause came on, plaintiff discovered defendant

Where the defendant, &c. is an infant, the plaintiff ought to apply to him to

name guardian;
in default there-
of, the plaintiff
must apply to
the court to
oblige defendant
so to do.

defendant to be an infant of about 17 years old, that he ought to have appeared and pleaded by guardian; therefore, if the plaintiff had proceeded to judgment on this record it would have been error. It was moved on behalf of plaintiff, that the defendant or his attorney might shew cause why the appearance in the filacer's book should not be struck out, and defendant be obliged to appear and plead by his guardian, and why the record should not be amended conformably thereto, and why the plaintiff should not have his costs occasioned by the defendant's attorney, who must be supposed to know his client was an infant, and who had led the plaintiff's attorney on to proceed so far erroneously; there was an affidavit of the fact that *Walds* was a trustee for the defendant in settlement, and must know he was not of age when he pleaded. On shewing cause, it appeared that *Walds* acquainted the plaintiff's attorney that the defendant was an infant (but this was after pleaded), and he not believing it, proceeded so far. *Cur.* In this case the plaintiff's attorney ought to have applied to the defendant to name a guardian, and if he did not in six days, then plaintiff ought to have applied to the court to oblige him so to do; and it was the plaintiff's own fault to proceed erroneously, although no notice had been given him that the defendant was not of full age; and the plaintiff had proceeded to judgment, and error had been brought, and afterwards the plaintiff had moved here to have made the record right, the court would not have done it; and therefore as to costs, there is more reason that the plaintiff should pay costs for being permitted to have the record made right, than that the defendant should pay costs to the plaintiff; however, as costs had not been prayed by the defendant, let the defendant plead by guardian in six days, and let the record be made agreeably thereunto, without costs on either side. *Shipman v. Stevens.* 2 *Wils.* 50.

It will be too late to apply after judgment and error brought, where plaintiff appeared for an infant according to the statute, for the appearance to be struck out, and why he should not appear by guardian; or in default, why plaintiff should not do it for him. *Kerry v. Cade. Barn. 413.*

Too late after error brought.

If an infant be served with process to appear by attorney, the court will make a rule for him to appear by guardian; or plaintiff to be at liberty to name one to appear and defend for him. *Barnes 418. Gladman v. Bateman.*

If he is served with process, court will make him appear by guardian.

An infant who lives with, and is properly maintained by her parent, cannot bind herself to a stranger for necessities. Common appearance ordered. *2 Black. Rep. 1326. Bainbridge v. Pickering.*

Cannot, if he lives with his parents, bind himself to a stranger for necessities.

How to proceed for Plaintiff Infant.

The writ may be sued out in the infant's name; but before the declaration delivered, a guardian must be appointed; which may be either by his appearance with the infant *in person*, before a judge; or by petition: if by petition, then prepare the same as follows:

In the Common Pleas.

A. B. the younger, Plaintiff,
and
C. D. Defendant.

To the Right Honourable Sir James Eyre, Knight,
Lord Chief Justice of his Majesty's Court of Common Pleas.

The humble petition of *A. B.* the younger, an infant under the age of twenty-one years, the plaintiff in this cause,

Sheweth,

That your petitioner has, as he is advised, good cause of action against the above-named *C. D.* for assaulting, beating, wounding, and ill-treating
S f your

Petition to assign a guardian to prosecute.

To be ingrossed
on a treble 6d
stamp paper.

your petitioner; and that your petitioner has some time since commenced an action against the said *C. D.* for the same; but in regard that your petitioner is an infant under the age of twenty-one years,

Your petitioner therefore most humbly prays your lordship, to assign unto him, *G. F.* of, &c. merchant, your petitioner's father, as and for your petitioner's guardian, to prosecute the said action against the said *C. D.* And your petitioner shall ever pray, &c.
J. G.

Infant signs his
name.

Acceptance to be
wrote under-
neath.

I do hereby agree to accept to be the guardian to the above-named *A. B.* an infant, according to the prayer of the above petition.
G. F.

Witness *J. G.* attorney for plaintiff.

Affidavit.

To be ingrossed
on a treble 6d.
stamp.

J. G. of, &c. gentleman, attorney for the plaintiff in this cause, maketh oath and saith, That *A. B.* the above-named plaintiff, did on the _____ day of _____ duly sign the petition hereunto annexed, in the presence of this deponent: and this deponent further saith, That he was also present, and did see *G. F.* the person mentioned in the said petition, duly sign the acceptance or agreement there underwritten, in order to his being a guardian to the said *A. B.* the younger.

Where to take
petition, &c.

Take the petition and affidavit to the judge's chambers, who will thereupon make his admission for plaintiff to prosecute by his guardian, pay 12s.; take same to the prothonotaries office, and enter it on their remembrance roll, pay 2s.; leave admission there, and when you declare, annex a copy of the admission to the declaration.

The form of the
declaration,

London, (ss.) C. D. late of *London*, yeoman, was attached to answer *A. B.* in a plea of trespass on the case; and whereupon the said *A. B.* by *G. B.* who is admitted by the court of our Lord the King here, to prosecute for the said *A. B.* who is within the age of twenty-one years, as the next friend of the said *A. B.* complains, *For that whereas (the*

same as in other cases); wherefore the said *A. B.* says he is injured, and hath sustained damage to the value of 100*l.* and therefore he brings his suit, &c.

The declaration need not alledge that the thing done for the infant is for necessities, for the plaintiff may shew it in case of plea of infancy, in his replication. *Fon. 146.*

In the *venire* and *habeas corpora juratorum*, say *Ven. & ha. corpa* *A. B.* by his next friend plaintiff, or *C. D.* by his next friend defendant.

This is the only difference in the suit (except in the *jurata*), there you make the plaintiff appear by his next friend, or the defendant, if it so happen.

Of the Defence.

It has been said, that an infant cannot defend *Defence,* without a guardian; therefore you must either take him and the guardian before a judge to be admitted, or it may be done by petition, as follows, (naming the cause.)

To the Right Honourable Sir James Eyre, Knight, Lord Chief Justice of his Majesty's Court of Common Pleas.

The humble petition of *C. D.* an infant, under the age of twenty-one years,

Sheweth,

That the plaintiff hath lately commenced an *Petition to assign* action at law against your petitioner, for [*here set* a guardian to defend, *forth the cause of action*], and your petitioner is advised and believes that he has a good defence to make thereto; but in regard your petitioner is an infant,

Your petitioner humbly prays your Lordship would be pleased to assign *G. H.* of, &c. as his guardian to defend his suit. And your petitioner shall ever pray.

C. D.

S f 2

I do

Affidavit is also required, as in the former one to prosecute.

I do accept and agree to be the guardian of the said *C. D.* an infant, according to the prayer of the above petition. G. H.

Witness, J. G.

Take the petition and affidavit to the judge's chambers, leave it there for his admission, pay 12s. then take the admission to the prothonotaries office, and enter it on a remembrance roll, pay 2s.; annex a copy of the admission to the plea. Enter appearance with the filacer (*except in ejectment, then with the prothonotaries*).

Plea of infancy per guardian.

And the said *C. D.* by *G. H.* who is admitted by the court of our Lord the King here, to defend for the said *C. D.* who is under the age of 21 years, comes and defends the wrong and injury, when, &c. and says, That he the said *C.* at the time of the making the said several promises and undertakings in the said declaration mentioned, was under the age of 21 years, to wit, of the age of 19 years, and no more, to wit, at *London*, aforesaid, &c. and this he is ready to verify; wherefore, &c. if, &c. T. W.

If infant appears and pleads by attorney, and plaintiff finds it out, how to proceed.

If an infant appear and plead by attorney, and plaintiff finds it out, he may in vacation time apply to a judge for a summons (or in term for a rule), to shew cause why the appearance should not be struck out and the plea set aside, and that defendant may *within six days* have a guardian appointed him to defend, or that plaintiff may be at liberty to name one for him; but this will be too late after trial. *Barnes 413. Kerry v. Cade.*

If infant does not appear by guardian, how plaintiff is to proceed in vacation.

If defendant does not appear by guardian in the time allowed by the rules of the court, the plaintiff must procure an affidavit of the service of the copy of the writ, and that defendant is an infant, and hath not appeared; upon which the judge, without your taking out a summons, will make an order, "*That unless the infant appears within six days after personal service of the order, plaintiff may of*" "fjs"

"sign John Doe for his guardian, and enter appearance for defendant;" and upon affidavit of the service of this order, and shewing the original, the judge will make the order absolute; then an admission is drawn up and filed as aforesaid.

It is clear that the infant plaintiff, who sues by *prochein amy*, is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable, *Str.* 548. *Barnes* 128.; and if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another, who is, *Str.* 708. The *prochein amy* is liable to costs for not proceeding to trial. *Englefield v. Round. Cooke's Rep.* 32. But an infant defendant (although he names a guardian) is liable to costs, if the verdict be against him. *Dy.* 104. 1 *Bulstr.* 189. *Str.* 1217.

Infant plaintiff not liable to costs, but *prochein amy*, &c.

Infant defendant is liable to costs, although he names a guardian.

When no error.

In ejectment or personal actions, if an infant sues by attorney, it shall be aided after verdict, *stat.* 21 *Jac.* 1. c. 13. And by *stat.* 4 & 5 *Ann.* after judgment by confession, *nil dicit, non sum informatus*, or after inquiry executed.

Statute of Limitations, *Vide p. 26.*

Of suing out a Writ to save the Statute.

The statute never begins to run against a plaintiff who is a foreigner, until he comes into this realm.

Capias is the commencement of the suit,

Attachment of privilege, though returnable on a general return-day, held good to save the statute,

IF the plaintiff is a foreigner, and doth not come to *England* in fifty years, he has still six years after his coming into *England* to bring his action; and if he never comes to *England* himself, he has always a right of action while he lives abroad, and so have his executors or administrators, after his death. *Strithorst v. Græme. 3 Wils. 145.*

It was held, that a *capias ad respondendum*, which was given in evidence to save the statute, without an original, was the true commencement of a suit in this court; for *per Gould, J.* the original must be presumed, for it immediately precedes the *capias. 3 Wils. 465. Leader v. Maxon*, and *per Blackstone, J.* every body now understands, that a *capias* is the commencement of a suit in this court; and that there is no necessity to file an original, but in case of outlawry; and the court always intends that an original has regularly issued, whereupon the *capias* is grounded, so that a *capias* in this, and all other statutes of limitations, is sufficient evidence of an original. *2 Black. Rep. 925. S. C.*

An attachment of privilege sued out, returnable in eight days of the *Purification*, was replied to the statute of limitations; upon demurrer, it was held, that it was not a nullity, but merely informal, which the court on application would have amended; and that a suit actually begun, however informal or irregular, is sufficient to stop the statute of limitation. Judgment for plaintiff. *2 Black. Rep. 1132. Leadbetter v. Markland.*

It is laid down in all the books, that an original must be sued out, but the determinations of the cases above stated have shewn otherwise; therefore sue out a *common capias*, (a memorandum or minute

on a 2s. 6d. stamp must be filed,) and get it signed and sealed as usual, then leave it at the sheriff's office for a return of *non est inventus*; which being done, apply to the prothonotaries clerk for a roll, and enter thereon thus:

London. (ff.) The lord the King hath sent to his sheriffs of London his writ closed, in these words; to wit, *George* the Third, &c. (to the end of the *capias* and filacer's name); then say, At which day came here the aforesaid *A.* (the plaintiff) in his proper person, and the sheriffs, to wit, —

—, Esquire, and —, Esquire, sheriffs of the said city, returned, that the aforesaid *C. D.* was not found in their bailiwick, and the said *C.* did not come. Take the roll to the prothonotaries office, docket it, and pay 2s.; file the *capias* with the *custos brevium*, pay 4d.

There must be an actual return made by the sheriff of the writ. *Bull.* 151. And continuances may be entered on the roll to the time you sue out a new writ, which must be shewn in the replication in case of a plea of the statute of limitations. 2 Vent. 192. *Vide my Instr. K. B.* 529.

An actual return must be made.

An attachment of privilege is in the nature of an original writ, and when replied to, in order to save the statute, it is sufficient to shew the teste thereof, without any continuances, to the time of the declaration, 1 *Wils.* 167. in error from *C. P.* *Style* 373. 401.; but if a *lat.* or a *clausum fregit* be replied, it must be shewn that it was continued properly to make the foundation of the suit, *Carth.* 234.; and of that opinion was the court.

Attachment in nature of an original, and when replied to, it is sufficient to shew the teste.

If a person be privileged as a *peer*, *member*, *attorney*, or the like, a bill must be filed, and not a writ sued out.

Satisfaction.

Satisfaction is either given of a recompence for an injury done, or else where a judgment is had against the person who pays the money upon it; and the entry on the record ought regularly to be

Satisfaction, what.

made to discharge the same, or the judgment apparently continues in force against the party convicted thereon. And for this purpose, the party making satisfaction may demand of the other a warrant of attorney, directed to the attorney on record, or some other attorney of the court where the judgment is entered, authorizing such attorney to enter up satisfaction.

A guardian may acknowledge.

A guardian for an infant may acknowledge satisfaction for a debt, which as guardian he hath recovered for the infant. *Lilly's Reg.* 606.

Warrant of attorney.

To be ingrossed on a 6s. stamp.

These may be had at the stationer's already printed.

To *A. B.* and *C. D.* attorneys of the court of Common Pleas at *Westminster*, jointly or severally, or to any other attorney of the same court.

Whereas *I. G.* of, &c. gentleman, heretofore, (*videlicet*) in or about the term of the *Holy Trinity*, in the 33d year of the reign of his present majesty, obtained judgment in his majesty's court of Common Pleas, at *Westminster*, against *John Denn*, of, &c. Esquire, for 1000*l.* debt and 63*s.* damages, as by the said record thereof may appear: *And whereas* the said *I. G.* hath received satisfaction for the same, *These* are therefore to desire and authorize you, the attorneys above-named, or any one of you, or any other attorney of the same court, to acknowledge and enter satisfaction upon the record of the same judgment, and for your so doing, this shall be your sufficient warrant and discharge in that behalf. In witness whereof I have hereunto set my hand and seal, this day of

1793.

Sealed and delivered, &c.

Put in the margin the day judgment was signed, and the No. roll filed.

Satisfaction how to be entered in term.

In term, apply to the clerk of the treasury, if your roll is filed and judgment complete, for the roll, who will take same into court, and the secondary will enter satisfaction thereon, pay 1*s.* per hundred for the poor's box, 2*s.* to the prothonotary, and 1*s.* to the secondary.

In vacation, apply to the clerk of the judgments, *In vacation.*
 Mr. Lickbarrow, who will prepare a *fiat*, and attend
 with the attorney before a judge, who signs it;
 then the clerk of the judgments will enter satisfac-
 tion on the roll, and he takes for all the fees,
 7s. 8d. But if the judgment be above ten
 years standing, he will take 5s. more, as an *extra*
 fee due to the clerk of the treasury.

The entry is, afterwards, to wit, on the next term, in the year of the reign of the lord the now King at *Westminster*,
 cometh the said J. G. by his attorney aforesaid, and
 acknowledgeth himself to be satisfied by the said
 J. D. of the debt, damages, and costs aforesaid;
 wherefore the said J. D. is acquitted of the said
 debt, damages, costs, and charges aforesaid, &c.

Ejectment.

This action a
fiction.

The nature of
the action.
Vide my Instr.
5 ed. 530.

Adopted in lieu
of almost all
real actions.

AN ejectment is an *ingenious fiction* for the trial of titles to the possession of land. In form it is a trick between *two*, to dispossess a *third* by a sham suit and judgment. The artifice would be criminal, unless the court converted it into a *fair trial* with the proper party. The control the court have over the judgment against the casual ejector, enables them to put any terms upon the plaintiff which are just.

This action is an invention by the court, (though *fictional*) for the advancement of justice, and to force the parties to go to trial upon the merits without being entangled in the nicety of pleading on either side.

The plaintiff and defendant are, in the first instance, merely nominal, *where there is a tenant in possession*, and the *lessor* of the plaintiff, and the *tenant in possession*, are substantially and in truth the parties to the suit.

The great advantage of this *fictional* mode, is that being under the controul of the court, it may be so modelled as to answer in the best manner every end of justice and convenience. 3 Burr. 1290.

Public utility has adopted it in lieu of almost all *real actions*, which were embarrassed and entangled with a thousand niceties. But as there was good and bad in real actions, the good ought to be grafted in ejectments into such manner as to avoid the bad. 3 Burr. 1296.

It is a possessory remedy, and only competent where the lessor of plaintiff may enter, by proving a possession within twenty years, or accounting for the want of it under some exceptions allowed by the Stat. 21 Jac. 1. c. 16. 1 Burr. 60. Every plaintiff must shew a right of possession, as well as of property.

property, and thereon the defendant need not plead the statute. *Burr.* 119.

The real damages in ejectment, are after the judgment and writ of possession recovered in an action for the *mesne profits*, which the tenant hath wrongfully received.

How the *real* damages to be recovered.

There is no distinction between a judgment on verdict, or by default: in the first case, the right of the plaintiff is tried and determined against the defendant; in the last, it is confessed. *Burr.* 668.

No distinction between verdict and by default.

If there be a fine levied with proclamations, an actual entry is necessary to avoid it; and must be made before the ejectment brought, 2 *Str.* 1086.: and the demise cannot be carried beyond the actual entry. 3 *Burr.* 1897. *Vide* 1 *Wils.* 214. By *stat. Ann.* c. 16. s. 16. Action must be commenced within one year after making such entry or claim.

If fine levied, actual entry.

The party is to make a formal, but peaceable entry on the land, declaring that he thereby takes possession; or he may enter on any part of it in the same county, declaring it to be in the name of the whole: but if the land lie in different counties, he must make different entries. *Co. Lit. sect.* 417. 252. *sect.* 422. 419. 423. But if there be a fine at common law, there need no actual entry, 2 *Wils.* 7. How far another may enter for the claimant, *Str.* 1128.

Actual entry.

How to proceed if no Tenant in possession.

If there be no actual tenant or occupier of the lands (except in the case of landlord and tenant, where the landlord has a right of re-entry as upon a lease; where half a year's rent is left unpaid), the mode of proceeding will be by sealing a lease on the premises; and it is first necessary that the claimant do take possession of the lands, by making a formal entry thereon, to empower him to constitute a lessee for years; and being in possession of the soil, he, thereon the land, seals and delivers a lease for years to such lessee, and having thus given him entry, leaves him

How to proceed, if no tenant in possession (except under the 4 Geo. 2.)

him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him, or till some other person (either by accident or agreement before hand) comes upon the land, and turns him out, or ejects him. For the injury the lessee is entitled to his action of ejectment against the tenant, or the casual ejector, whichever it was that ousted him, to recover back his term and damages.

Defence.

There is no instance of a vacant possession (except such as are within the *Stat. 4 Geo. 2. c. 28*) can be adduced, in which any person claiming title, hath been let in to defend; for he who first seal a lease on the premises, may obtain possession, and any other person claiming title, may eject him if he can, and by the constant practice, no defence can be made in this case, but by the defendant in the ejectment, which is a real ejector. *Ex per Beauchamp and Burt. Barnes 177.*

But this rule is not to be extended farther than to prevent mere strangers from being admitted as defendant. *Espinasse, L. N. P. 166.* Therefore a purchaser of a reversion, which seemed to have a pretended title, and where no rent had ever been paid, was held to be inadmissible as a defendant. Quoted in 3 *Burr. 1291.*

Supposing *A.* to be the person claiming title of the premises, he may, if he pleases, sign the following letter of attorney to empower *D.* to execute a lease in his name, of the premises in question, to *E. F.* which is done upon the premises, *D.* and *E. F.* being only thereon; then *D.* after having executed the lease to *E. F.* leaves him in possession of the premises, who is turned out by *G. H.* to whom, whilst on the premises, *E.* delivers a declaration in ejectment.

The form of the letter of attorney, if requisite.

Know all men by these presents, that I A. B. of &c. gentleman, have made, ordained, constituted and appointed, and by these presents do make, ordain, constitute and appoint C. D. of, &c. holder

to be my true and lawful attorney, for me, and in my name, to enter into and take possession of a certain messuage late in the tenure or occupation of *E. F.* and *J. H.* situate and being in the parish of *St. C.* in the county of *Oxford*, but now untenanted, and after the said *C. D.* hath taken possession thereof, for me, and in my name, and as my act and deed, to sign, seal, and execute a lease of the said premises, with the appurtenances, unto *E. F.* of the parish of *St. C.* maltster, to hold the same unto the said *E. F.* his executors, administrators, and assigns, from the day of last past, before the date hereof, for the term of five years, at the yearly rent of a pepper-corn (if lawfully demanded), subject to a proviso, to make void the same on payment by me of the sum of sixpence to the said *E. F.* In witness, &c.

Sealed and delivered, &c.

This indenture, made, &c. between A. B. of, The lease;

St. C. gentleman, of the one part, and *E. F.* of, &c. of the other part, witnesseth, That the said *A. B.* for and in consideration of the sum of 5*s.* of lawful money of *Great Britain*, to him in hand paid by the said *E. F.* at and before the sealing and delivery of these presents, the receipt whereof, the said *A. B.* doth hereby acknowledge, hath demised, granted, and to farm let, and by these presents doth demise, grant, and to farm let, unto the said *E. F.* his executors and administrators, all that messuage, &c. situate and being in the parish of in the county of *Oxford*, late in the possession of *J. K.* but now untenanted, to have and to hold the said messuage and premises hereby demised, with the appurtenances, from the day of last past, before the date hereof, for and during, and unto the full end and term of five years, from thence next ensuing, and fully to be complete and ended, holding and paying therefore yearly, and every year, during the said term, unto the said *A. B.* or his assigns, the rent of one pepper-corn, if lawfully demanded, at the feast day of

Provided

Proviso.

Provided always, and upon this condition, that if the said *A. B.* shall at any time or times hereafter tender, or cause to be tendered, unto the said *E. F.* his executors or administrators, the sum of 6d. then this present indenture shall be void, and of none effect (any thing herein contained to the contrary in any wise notwithstanding). In witness whereof the parties hereto have interchangeably set their hands and seals, the day and year first above written.

Sealed and delivered as the act and deed of the above-named *A. B.* by *C. D.* of _____ in the county of _____ hofier, by virtue of a letter of attorney to him for that purpose made by the said *A. B.* bearing date the _____ day of _____ instant, being first duly stamped in the presence of _____

If no letter of attorney.

If there be no letter of attorney made, then the owner of the land must go upon it before the effoign day of the term, and there seal and deliver a lease to a friend of his as tenant, and at the same time, deliver him possession of the premises. This being done, get another person (a friend) to go upon the premises, and turn out the tenant, by thrusting him off the premises, and afterwards let such ejector remain on the premises, and whilst he continues there, serve him with a declaration in ejectment, in which make the tenant the plaintiff, the landlord the lessor, and the actual ejector the defendant, and declare on the demise in the lease, and write a notice at the foot of the declaration, to appear and plead as hereafter.

Declaration.

A memorandum on a 2s. 6d. stamp to be filed with the secondary.

The declaration is the same as others, only instead of *John Doe* and *Richard Roe*, the plaintiff and defendant are, in this case, the real persons; as for instance, *E. F.* the lessee of the premises, will be plaintiff, and *G. H.* the defendant; *A. B.* will be the lessor of the plaintiff; and instead of the common notice at the end, put this:

Mr. G. H.

Take notice, that unless you appear in his Majesty's court of Common Bench, at *Westminster*, within the first *four* days of *next* Trinity term, at the suit of the above-named plaintiff, *E. F.* and lead to this declaration in ejectment, judgment will be thereon entered against you by default. Yours, &c. *C. F.*

If in the country eight days.

After service, there needs no affidavit of these facts or of service, nor any motion for judgment; but on the first day of term give a rule to plead, as in common cases, and at the expiration, if no appearance and plea, sign judgment.

After service, how to proceed.

N. B. This is more concise and different from the King's Bench practice, as that court requires an affidavit of all the facts, and motion.

Of Notice to quit.

Where the tenant holds the premises of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe, that demises, where *no certain term* is mentioned, are held to be tenancies from *year to year*, which either party can determine, without reasonable notice to the other. This notice is, in most countries, *six months* preceding that part of the year when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit possession must be given to such tenant, before the end of which time the landlord cannot maintain an ejectment (unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant, in which case no notice is necessary). And the same law will apply to the executor of such a tenant. *3 Wils. 25.* But after the expiration of a lease for a *certain term*, the tenant continuing in possession is deemed a trespasser; and therefore an ejectment, which is an action of trespass, may be brought, *without any notice to quit.*

When notice to quit requisite, and when not.

When no notice is requisite.

Mortgagee
when he must
give notice.

Where lands are
let for years, and
afterwards mort-
gaged.

Half a year's no-
tice must be
given to a tenant
at will.

When double
rent.

Custom of
London.

Notice to quit
when to be given
by the rever-

A mortgagee may recover (without giving notice to quit) against a tenant who claims under a lease from the mortgagor, granted, after the mortgage, without the privity of the mortgagee. *Kerch v. Hall. Dougl. 21.* But if there is a tenant from year to year, and the landlord mortgages, pending the year, the tenant is entitled to six months notice from the mortgagee to quit. *Birch v. Wright. Ibid.* But where lands are let for years, and afterwards mortgaged, the tenant's possession is protected, and he cannot be turned out by the mortgagee: but the courts now permit the mortgagee to proceed by ejectment, if he has given notice to the tenant before the action, that he does not mean to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. *Whitely ex dem. Whateley v. Hawkins. M. 14 Geo. 3. K. B.* After notice to quit, given at Michaelmas, the acceptance of rent due from Michaelmas to Christmas is not a waiver. *Cowp. Rep. 243.*

Per *Wilmot, C. J.* and *totam curiam.* It has been doubted of late years, (and it is now resolved in this case,) that half a year's notice to quit possession, must be given to a tenant at will, before the end of which time an ejectment will not lie to turn him out of the farm. The same law was held in the case of an executor of a tenant at will. *Parker dem. Walker v. Constable. 3 Wils. 25.* The notice to quit must be at the end of the year. *Right v. Darby. Term Rep. K. B. 1 V. 160.*

If a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, he is entitled to double rent. *Messenger v. Armstrong. Term Rep. K. B. 1 V. 53.* Vide *my Instr. Cler. K. B. 472.*

By the custom of London, if the premises are above the yearly rent of 40s. half a year's notice must be given to quit; if under 40s. a quarter's notice. *2 Sid. 20.*

Ejectment for a messuage, &c. *John Jordan* tenant for life, remainder to his son the lessor of plaintiff.

plaintiff, with remainders over. The father died 22d of June 1785; he made a lease to defendant for twenty-one years, to commence from old Lady-day, 5th April then last; on which day defendant entered. 30th September 1785 the father died, and the estate came to lessor his son. Defendant continued in possession, paid rent to the lessor after death of father for two years on old Lady-day and old Michaelmas-day. Before old Michaelmas-day 1787, the lessor of plaintiff gave notice to quit on old Lady-day, 5th April then next; and he refusing, this ejectment was brought. It was contended that the notice to quit on 5th April was bad, it ought to have been 30th September, the end of the year, dated from the death of the father. Verdict for defendant. Motion for a new trial, and the court held that the verdict was wrong. The notice to quit was proper on 5th April. It was also fair and just to give the tenant notice to quit when his year ended, that the course of his husbandry might not be disturbed. Rule absolute. *Roe dem. Jordan v. Ward.* 1 H. Black. Rep. 97. For determinations in K. B. vide my *Instr. Cler.* 539.

If a tenant from year to year die intestate, his administrator has the same interest in the land the intestate had, and he must have the same notice to quit. 3 Term Rep. K. B. 13.

An insufficiency of notice may be insisted on at trial, though no objection made to it at the time when served. 4 Term Rep. 361. Vide 464.

to service of the notice.

For what an ejectment lies, vide my *Instr. K. B.* edit. 540.

soner after death
of tenant for
life.

Administrators.

Insufficient notice.

How to proceed if Tenant be in possession.

Where there is a tenant in possession, no actual notice is made, entry or ouster by the defendant, but are merely ideal, for the sole purpose of trying the title; therefore, in order to proceed against him, prepare a declaration in ejectment, ingross it

Where there is a
tenant in possession,
no lease is
necessary.

T t

on

on a treble penny stamp paper, the copy of which (upon stamp) you serve the tenant with. These declarations on one demise are printed, and may be had at the stationer's.

If there are more tenants than one, each tenant must be served with a copy; but if the man is not at home, his wife may be served. 2 *Black. Rep.* 800. *Goodright v. Thrustout.* Barnes 178. 194. 2 *Wils.* 263. If the tenant himself be served, it need not be on the premises; but if the wife be served, it must be so.

May be served
on tenant's fa-
ther, &c.

It may be served on the tenant's father, son, daughter, sister, or servant, *on the premises*, (the tenant being out of the way, and they live with him,) provided the tenant *acknowledges the receipt thereof*, which must be contained in the affidavit. Barnes 176. *Roe v. Doe.* At the time of service, read over or explain the notice at the foot thereof.

Of absconding Tenants.

Absconding
tenants, &c.

If the tenant absconds, or keeps out of the way, to avoid being served, it is usual to serve a declaration on some person residing at his house, or if that cannot be done, to affix the same on his door, and then, upon an affidavit of the circumstances, to move the court for a rule, why such service should not be deemed sufficient; and the court will prescribe the mode of serving the rule, which is generally made absolute on an affidavit of the service. Barnes 188. 190. *Roe v. Doe.*

In ejectments in
Middlesex and
London, the te-
nants to be told
when to appear.

By rule T. 32 *Car.* 2. It is ordered, That the plaintiffs or their attornies, or the parties which cause declarations to be delivered in ejectment, in the county of *Middlesex* and *London*, upon such delivery thereof, shall tell the tenants in possession of the tenements in question respectively, that they are to appear by an attorney of this court, in defence of the title thereof, in the beginning of the term next after the delivery of such declaration.

Per Cur. An ejectment on a vacant possession in London, or *Middlesex* on the new act, may be moved at any time in term; and is not within this rule, which relates only to declarations in ejectment served upon tenants in possession. *Negative v. Positive. Barnes 172.*

Cases respecting the Service.

Serjeant Kettleby moved, upon an affidavit of tending the declaration to *Jane Reynolds, widow*, which she refusing to accept, it was left on the floor in her presence; and she retiring into a parlour, and shutting the door, the person serving read the subscription aloud, so as she might hear it, which was held sufficient. *Barnes 185. Bagshaw v. Toogood.*

What is good service.

Mrs. Northcot the tenant in possession, a single woman, absconded, and secreted herself in the messuage in question, and could not be personally served; a rule was made to shew cause why service on the servant at the house should not be good; the rule to be served in the same manner. *Barnes 188. Short v. King.*

Secreting;

Where the tenant and his wife both absconded, and could neither be served, and it appeared that they had left a woman servant in the house on the premises, in whose presence a declaration was fixed up; the court made a rule for the tenant to shew cause, why service on the servant should not be deemed good, and directed the rule to be served in that manner. *Barnes 188. Dem. of Preston.*

Where tenant and wife both absconded.

On affidavit that *Lydia Brooke*, widow, absconded to avoid being served, and came into the house surreptitiously, and service on her son who was her servant and manager and lives in her family; rule was granted why service on her son and servant should not be deemed good service, and leaving copy at her house. *Roe v. Doe. Barnes 190.*

Person came in surreptitiously.

If a declaration is tendered (through a window) and refused, and violence threatened, if he did not

Declaration tendered through a window.

get off the land; the declaration being laid on the ground in the presence of *Wightman* the tenant and his man, whom *Wightman* ordered not to take it up, the court held that these circumstances amounted to good service. *Halfel v. Wedgwood. Barnes* 174.

Service on wife. Service on the wife of tenant; as she informed deponent, and as he verily believes, is good. *Du v. Roe. Barnes* 194.

Wives. Affidavit of service on wives of *A.* and *B.* who or one of them are tenants, bad. *Barnes* 174. *Harding v. GreenSmith.*

So on *A. B.* tenant; or *C.* his wife. *Ibid.* 173. *Birkbeck v. Hughes.*

Tenant absconds. Tenant, unmarried man, absconded, and left servant in the house; on affidavit that a copy was served on the servant, and another affixed on the street door, the court made a rule for judgment. *Smalley v. Neale. Barnes* 173.

Delivered to a daughter, and owned by tenant. Declaration delivered to the daughter of tenant in possession, and acquainted with the contents, the tenant afterwards acknowledged the receipt of it, held sufficient service. *Scrape v. Hunt. Barnes* 175. So where left with the father, the tenant acknowledged the receipt of it. *Roe v. Du. Barnes* 176.

Tendered to the wife on the premises through a window; she refused to receive it, and it was left on the ledge, &c. Declaration tendered to wife upon the premises, she was acquainted with contents through a window, which she refused to open, or receive the declaration, declaration left on the outside ledge of the window. The person who tendered the declaration swore that he heard the woman's voice distinctly through the window; and was well assured she heard what he said by the answers she gave him, held sufficient. *Farmer v. Thrustout. Barnes* 180.

Tenant acknowledged receipt on a Sunday, good. Tenant in possession acknowledged on a Sunday the receipt of declaration delivered to his daughters, and she acquainted with the contents, held sufficient service. *Goodtitle v. Thrustout. Barnes* 183.

On affidavit, that one of the tenants was a lunatic; that one C. lives with, transacts her business, and has the sole conduct thereof, and of her person, but would not permit deponent to have access to her with the declaration in ejectment; whereupon it was delivered to C.: rule that she and C. both shew cause why this service should not be good, and service of this rule on him be deemed good service. *Barnes* 190. *Doe v. Roe. dem. Wright.*

The like rule granted on service on C. the person who had the care of a lunatic.

On affidavit that a person tendered a copy of the declaration to the wife of the tenant in possession in the shop, and would have read to her the notice to appear, but she refused to hear it, or to receive the declaration, and said she would have nothing to do with it, and turned out of the shop and shut the door after her, whereupon the declaration was left in the shop. *The court* thought it ought to have been read aloud in the shop, but made a rule to shew cause why this should not be deemed good service; and in a few days after, the court made a like rule on an affidavit that the tenant kept out of the way to prevent being served. *Doe ex dem. Neal v. Roe. 2 Willf. 263.*

Tender to the wife in the shop, though she refused to hear it read, or receive the declaration, same being left, held good.

The attorney shewed copy of declaration to the wife of tenant, in his absence; acquainted her with the contents, and would have read the notice; but she said she could read it herself; took it from him, and run her eye over it as if she read it; held good service. *Goodright v. Thrushout. 2 Black. Rep. 800.*

Copy shewn to the wife, who took it and read it.

On affidavit, that tenant in possession secreted himself, to prevent his being served with ejectment, and could not serve it, though frequent endeavours had been used; and that the declaration had been delivered to his daughter (who kept his house, being a public house); and that she was acquainted with the contents of the subscription: a rule was made, for the tenant to shew cause why such former service should not be deemed good service; the rule to be served on the daughter at the house. *Barnes* 192. *Fenn v. Denn.*

The like rule on the service of the tenant's daughter, tenant having secreted himself.

Service on churchwardens and overseers, who rented a poor-house, held good.

Service on the daughter, (tenant nor wife at home,) afterwards wife acknowledged the receipt of ejectment, and it was read over and explained to her, good.

Service on the churchwardens and overseers of the parish, who rented an house for harbouring some of the parish poor, and did not otherwise occupy the house, than by placing the poor in it, deemed sufficient. *Barnes 181. Tupper v. Doe.*

18th June 1791, attorney went with ejectment to tenant's house, but not finding him or wife at home, he left it with his daughter, and acquainted her with the contents and meaning of it. On a subsequent day he called at the house and saw tenant's wife, (tenant not at home,) inquired of her whether she had received the declaration; she answered she had received it, and shewed it to the attorney, who read it over, and explained it to her. She then said her husband had not been at home since the paper was delivered to her daughter, but that she would send it to him. Court made rule absolute for judgment against casual ejector, without a rule to shew cause, on the authority of *Goodtitle v. Thrustout, Barn. 183*, though the affidavit did not say, it came to the wife's hands before the effoign day. 1 *H. Black. Rep. 644. Smith v. Hurst.*

Of the Time of Service and Notice to appear.

When to be delivered or served.

All declarations in ejectment must be delivered *before the effoign day* of the term, otherwise plaintiff cannot have judgment. *Roe dem. Bird v. Doe. Barnes 172.* And the notice must be made to appear in the next term after the delivery or service: but the delivery on a *Sunday*, or on the *effoign day* of that term wherein the defendant is to appear, will not do.

Country.

So in the country, it must be served *before the effoign day* of *Hilary or Trinity term*, or he is not bound to plead, so as to go to trial at the assizes: but the delivery on a *Sunday*, or *effoign day* of that term wherein defendant is to appear, will not do.

When motion to be made.

If a country ejectment is served on the tenant to appear in *Michaelmas* or *Easter* term, the plaintiff

must make his motion for judgment in that term *be has made the notice for his appearance*, or he can have no rule for judgment, unless on special application.

If the premises be in *London or Middlesex*, the notice must be made to appear the *first day* of the next term after service; for if made generally, the tenant in possession has the *whole term to appear in*; but if the tenements lie in any other county, the notice must be to appear as of the *next term generally*.

When to make the notice to appear.

Declarations.

Trinity Term, in the 33d year of the reign of King George the Third.

London, (ss.) Richard Roe, late of London, yeoman, was attached to answer John Doe in a plea, wherefore with force and arms, &c. he entered into five messuages, and one acre of land, with the appurtenances, in the parish of Saint Dunstan in the West, in the said city, which John Sibthorpe demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said John Doe, and against the peace of our sovereign Lord the now King; and whereupon the said John Doe, by A. G. his attorney, complains, For that whereas the said John Sibthorpe, on the 2d day of April, in the thirty-third year of the reign of his said Majesty, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe the said tenements, with the appurtenances, To have and to hold the said tenements, with the appurtenances, to the said John Doe and his assigns, from the 1st day of April then last past, to the full end and term of five years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and was possessed thereof; and the said John Doe being so possessed thereof,

Declaration in ejectment on one demise.

To be ingrossed on a treble penny stamp paper.

The venue is local, and must be where the lands lie.

thereof, the said *Richard Roe* afterwards, to wit, on the said 2d day of *April*, in the thirty-third year aforesaid, with force and arms, (that is to say,) with swords, staves, and knives, entered into the said tenements, with the appurtenances, which the said *John Sibthorpe* demised to the said *John Doe*, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *John Doe* out of his said farm, and other wrongs, &c. to the grievous damage, &c. and against the peace, &c.; whereupon the said *John Doe* saith, that he is injured, and hath damage to the value of 10*l.* and thereupon he brings suit, &c.

Notice,

Mr. T. G. I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof; and I being sued in this action as a casual ejector, and having no claim or title to the same premises, do advise you to appear, the * first day of next *Michaelmas* term, in his majesty's court of Common Bench at *Westminster*, by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me, and you will be turned out of possession.

* If in the country, say, "next *Trinity* term."

Your loving friend, *Richard Roe.*

Care,

N. B. Care must be taken that the nominal defendant's name be put at the end of the notice, and not the nominal plaintiff, or no rule for judgment will be granted. *Peaceable v. Troublesome. Barnes* 172.

Contra K. B. 3 Term Rep. 351. I remember this court very lately refused the motion for want of that name.

A fair trial is the ground and reason of ejectments.

The venue was laid in *Yorkshire*, and it ought to have been laid in the county of the city of *York*.

Motion

Motion to amend; and on rule to shew cause being served on the tenant, it was made absolute. After this there must be motion for judgment against the casual ejector. *Tening v. Cutts.*

Michaelmas Term, in the 34th year of the reign of King George the Third.

Staffordshire, (H.) Richard Roe, late of Stafford, Declaration on a
the county aforesaid, yeoman, was attached to *double demise.*

answer *John Doe*, in a plea, wherefore, with force and arms, he entered into one messuage, one orchard, one garden, seventy acres of land, seventy acres of pasture, and seventy acres of meadow, with the appurtenances, in the parish of *F.* in the said county, which *J. G.* demised to the said *John Doe*, for a term of years which is not yet expired: and so, wherefore, with force and arms, he entered into one other messuage, one other orchard, one other garden, &c. (as before,) with the appurtenances, in the parish of *F.* in the said county; which *T. P.* demised to the said *John Doe*, for a term which is not yet expired, and ejected him from his said several farms, and other wrongs to him then and there did, to the great damage of the said *John Doe*, and against the peace of our Lord now King; and whereupon the said *John Doe*, by *J. K.* his attorney complains, *That whereas* the said *J. G.* on the 14th day of *February*, in the year of our Lord 1793, at the parish of *F.* aforesaid, in the county aforesaid, had demised to the said *John Doe*, the said tenements first above-mentioned, with the appurtenances, *To have and to hold* the said tenements first above-mentioned, with the appurtenances, to the said *John Doe*, and his assigns, from the 13th day of *February* then past, for and during, and unto the full end and term of seven years from thence next ensuing, and fully to be

* How to describe the premises if brought for a rectory, vicarage, &c. vide my Instr. K. B. 5 edit. 546. or by a corporation.

complete

Second count.

complete and ended: And also, whereas the *T. P.* on the 14th day of *February*, in the year our Lord 1793, at the parish of *F.* aforesaid, in the said county, had demised to the said *John Doe*, the tenements aforesaid, secondly above-mentioned with the appurtenances, *To have and to hold* the same with the appurtenances, to the said *John Doe* and his assigns, from the 13th day of *February* the past, for and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended: by virtue of which said several demises, the said *John Doe* entered into the said several tenements, with the appurtenances and was possessed thereof; and being so possessed thereof, he the said *Richard Roe*, afterwards, to wit on the said 14th day of *February*, in the year aforesaid with force and arms, &c. entered into the said several tenements, so demised to him as aforesaid, with the appurtenances, in and upon the possession of the said *John Doe*, his said term therein not being yet expired; and ejected the said *John Doe* out of his said several farms, and other wrongs, &c. to the great damage, &c. and against the peace, &c. whereupon the said *John Doe* says he is injured, and hath sustained damage to the value of 10*l.* and therefore he brings his suit, &c.

Add the notice as in the last, to appear at *Trinity* term generally.

How the premises are to be inserted in the declaration.

So exact a description as in a *præcipe* not necessary.

In this declaration the law requires, that the *thing demanded* be so specified, that the sheriff may certainly know what to give the possession of, the plaintiff should recover; for it would be in vain, execution could not be had of the thing specifically demanded. 2 *Lord Raym.* 1470. 2 *Str.* 90. But such a very exact description is not equally necessary in this action, as in a *præcipe*. In this action, the plaintiff is to shew the sheriff, and is to take possession at his peril, of only what he has title to; if he takes more than he has recovered the court will in a summary way set it right. 1 *Burr.* 629.

In what County to be brought, and of the Demise.

It must be brought in the county where the lands and the declaration must set forth *the particular* *title*; and the *day* of the *demise* must be laid *for the title accrued*, otherwise plaintiff will be defeated, and the plaintiff must lay *the commencement* of his supposed *lease* to have been *precedent* to *ejectment* by the defendant. 1 *Sid.* 8. 2 *New* 171.

In what county to be brought,

Demise.

If there be several lessors, and it is laid that they *demised*, you must shew such a title in them, that they could demise *the whole*. *Cro. Jac.* 166.

Demise of several lessors.

If lessors be *tenants in common*, there ought to be different count on the demise of *each*; or they may join in a lease to a third person, and that lessee may make a lease to try the title: for tenants in common cannot make a joint lease. 2 *Wils.*

Tenants in common.

But if there are several *coheirs*, each must make a lease. But *joint-tenants* are seised *per my et tout*; and therefore each may be said to demise *the whole*. So if *coparceners*, for they stand on the same foundation. *Bull.* 107. A demise of a corporation in ejectment was held to be good, without mentioning it was by deed. 1 *Lord Ray.* 136. *tra Carth.* 390.

Coheirs.

Joint-tenants.

In ejectment on the demise of an heir by descent, the demise was laid the day his ancestor died, and held to be well enough. 3 *Wils.* 274. *Roe ex Wrangham v. Hersey*. If my ancestor die at five o'clock in the morning, I enter at six, and make a lease at seven, it is good. *Ibid.*

Ejectment on demise of heir.

If the title of the lessor of plaintiff accrue in *Easter vacation*, yet the plaintiff may deliver his declaration as of *Easter term*, and shall recover thereon because he makes up his issue, or takes judgment as of the *next term*; otherwise the act of the plaintiff, which supposes the writ sued out as of the day of *Easter term*, before a title accrued to plaintiff, would be an act of injury to him, and by his right; for a man ejected out of a lease made

If title accrues in *Easter vacation*, yet you may deliver declaration as of *Easter term*.

Within what time to be brought.

made in term time, could not complain till term was over. 2 *Vent.* 174. It must be brought within twenty years. 21 *Jac.* 1. c. 16. *Sid.* 432.

Of the Motion for Judgment.

Within what time motion for judgment must be made.

It is ordered, That the plaintiffs for the future shall take nothing by motion made for judgment against the casual ejector for default of appearance unless such motion be made within *one week* next after the *first day* of every *Michaelmas term*, and of every *Easter term*, and within *four days* next after the *first day* of *Hilary term*, and of every *Trinity term*. *R. T.* 33 *Car.* 2.

Relates only to tenants in possession.

This rule only relates to declarations in ejectment served upon tenants in possession in *London and Middlesex*.

And not on a vacant possession.

If an ejectment on a vacant possession be served in *London or Middlesex*, on statute 4 *Geo.* 2. c. 28 it may be moved at any time in term. *Negative Positive.* *Barnes* 172.

Country.

A country ejectment may be moved any time in the term in which notice to appear is made, or on the last day of that term.

How to move for judgment.

When the declaration is delivered, the next term make affidavit of the service thereof on the tenant, or his wife, and annex a copy of the declaration on a treble penny stamp paper, and move for judgment against the casual ejector, which is done by giving a serjeant 10s. 6d. with the affidavit of service, who signs his name thereon, and gives it to one of the secondaries with the affidavit, and memorandum on a 2s. 6d. stamp, pursuant to the statute 25 *Geo.* 3. c. 80. must be annexed; but first take a copy of the declaration, if it be in country cause. *N. B.* It need not be delivered by a serjeant in open court, but you must, if country cause, pay for filing affidavit 2s.

In the Common Pleas.

John Doe, on the demise of *J. P.* plaintiff,
and
Richard Roe, defendant.

A. B. of _____ in the county of _____
maketh oath and saith, That he this deponent did
on the _____ day of _____ last, personally serve
J. B. tenant in possession of the premises in the
declaration hereunto annexed mentioned, or some
part thereof, with a true copy of the declaration,
and notice thereunder written, hereto annexed, and
at the same time this deponent (read to him him the
notice thereunder written), or it may be (ac-
quainted the said *J. B.* of the intent and mean-
ing of the said declaration, and notice thereunder
written).

**Affidavit of the
service.**

To be ingrossed
on a treble 6d.
stamp paper.

To be sworn before a judge, if a town cause, and
a commissioner, if in the country. If the wife be
served, then say, "*served Mary, the wife of J. B.*
the tenant in possession of the premises, &c." And
this deponent further saith, that the said *Mary B.*
was, at the time of the service of such declaration,
on the premises (*if brought for a dwelling-house*);
if for land, state, *she was at the time of the service at*
the dwelling-house of her husband the tenant, and
where situate.

**Before whom to
be sworn.**

If wife served.

How to sign Judgment.

If the tenant does not appear with the filacer of
the proper county, and file his plea within the time
limited by the rule (*for which search the plea book at*
the prothonotaries office), draw up the rule for judg-
ment with the secondary, pay 7s.; enter the decla-
ration as far as the names of the plaintiff and defend-
ant, upon a double 2s. 6d. stamped paper; make
out warrants of attorney for plaintiff, and defend-
ant, and file them, the clerk marks the judgment-
paper; then take judgment-paper to the prothono-
taries office, pay signing 12s. 8d.; and the clerk
will give you a roll to enter up the judgment.

**If no appearance
in time, how to
sign judgment.**

N. B.

N. B. No appearance is entered with the filiae on the part of the plaintiff: when this is done you may make out a writ of possession; pay signing with prothonotaries 1 s. 4 d. seal 7 d.; no *procipe* is requisite.

If judgment signed, judge may stay proceedings.

If judgment be signed for want of a plea, and *possession given* in a country cause, a judge may, on an affidavit of merits, compel plaintiff to accept plea, or stay the proceedings. *Vide* 1 Salk. 111. But it is said there, if possession be given, he without remedy.

If judgment be regularly signed, but without loss of trial, it may, on affidavit of merits, be aside. *Vide* Str. 975.

Of amending the Declaration.

Amending declaration.

It was formerly held, that a declaration in ejectment could not be altered or amended after once delivered, in the most trivial matters; but it has since been held, that an ejectment is a mere fictitious action, and the demise mere matter of form, nor does it exist; and on application, the demise was ordered to be amended, but this was to save the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment. 4 Burr. 2447. 2 Burr. 1162. Therefore as the demise may be altered, there can be no doubt but that other parts less material may also be amended, the action being invented under the controul of the court, for advancement of justice, and merely to try the right in question. 1 Burr. 665. At that time, what amendments may be made in the *King's Bench*, the like may be done in this court. I have no doubt. *Vide* Pract. Reg. C.P. 17. 175.

Demise altered.

A summons after plea pleaded was taken out to amend declaration, by altering the demise from the 30th of April to the 1st of June. I opposed it, but Mr. Justice Gould said, they were altered every day, and made an order on payment of costs.

Trin. Vacation. 1792. Roe ex dem. Loxdale v. Doe.
in K. B. contra Barnes 186. 17.

The term of an ejectment enlarged, being so Term may be enlarged.
 id that it had expired twelve years before the ac-
 on brought, on payment of costs; a special jury
 ing struck, and the parties gone down to the as-
 es before mistake discovered. 2 *Black. Rep.*

10. *Per cur.* An ejectment is the creature of the
 ert, and open to every equitable regulation for ex-
 iting the true justice of the case. *Ibid. Roe dem.*
ex v. Ellis. Vide Str. 1272.

An amendment was made in the parcels and in Parcels may.
 e name of plaintiff for the defendant. *Williams*
Barclay. Pract. Reg. 16.

Of the Appearance.

If an ejectment is brought for lands in antient For lands in an-
 demesne, this court on application will stay the tient demesne.

proceedings, for it ought to be sued for in the
 minor court. *Boman v. Wright. Barnes 194.*

but the plea must be filed within the first four days
 of the term. For the party may always apply for

re within the four days; and though the appear-
 ce is generally entered afterwards, yet it is al-

ways considered as an appearance the first day of
 the term. *Deighton v. Foster. Barnes 187.* If

plaintiff prevails in this plea, the judgment must
 that defendant answer over. *Barnes 187.*

Adstitt v. Thrustout. There must be an affidavit
 ground this motion, that the land is antient de-

mesne, and swearing that the premises are reputed
 be lands in antient demesne is sufficient. *Doe*

Thomas. Barnes 185.

If the tenements lie in London or Middlesex, and In town.

notice be to appear the first day of term, the te-
 nt has four days to appear after motion made; if

the term generally, then the whole term.

If in the country, four days after the issuable term, In the country.

Hilary or Trinity, or if it be in a county where
 affizes are held but once a year, then four days

after

after the *end* of the *term* next preceding the *assize*. It is said, that the tenant cannot appear after the time allowed by the common rule for appearing is expired, *Say. Rep.* 151.; but I think any time before judgment signed.

Secondary on request to shew his paper of ejectment.

It is ordered, That the secondaries shall in the morning next after the end of every term, and at all other times, when required, produce and shew to any person or person, who shall demand the same, their alphabetical paper of ejectments moved or delivered in court in each term. *R. Hil. 2 Geo. 2.*

Tenant not obliged to appear.

The tenant is not obliged to appear, although his landlord offers to indemnify him. *Right v. Wrong. Barnes* 173. But he must give notice of the ejectment to his landlord. *11 Geo. 2. c. 19. s. 12.* or he forfeits three years improved or rack-rent of the premises held by him.

Tenants must give notice to the landlord.

Tenants are obliged to give notice to their landlords of declaration being served, on pain of three years improved or rack-rent of the premises held by the tenant. *Stat. 11 Geo. 2. c. 19. s. 12.*

If term ends *Wednesday*, judgment cannot be signed until *Tuesday* afternoon following. *Sunday* is no day.

Tenant to mortgagor in ejectment by mortgagee not liable to the penalties.

A tenant to a mortgagor, in an ejectment brought by his mortgagee, is not liable to the penalties. *1 Term Rep. K. B.* 647. It extends to cases only where ejectments are brought, which are inconsistent with the landlord's title. *Ibid.*

How to appear for Tenant.

The court will not endure the lessee to defend (alone) an ejectment against his landlord, or those claiming under him, on a supposed defect of title. *Driver v. Laurence. 2 Black. Rep.* 1259.

An ejectment is a fiction and in the breast of the court, tenants should be bound not to change the possession. *Plumb v. Savage. Barnes* 180.

How to appear for tenant.

Get a blank consent rule from the secondaries office unstamped, pay 6d.; fill it up in this man-

her, if you mean to defend for all the premises mentioned in the declaration.

In the Common Pleas.

Michaelmas term, in the 34th year of the reign of King George the Third.

Middlesex, to wit, *John Doe*, }
on the demise of *John Staples* }
against *Roe*, for four messuages, }
four barns, four stables, five hun- }
dred acres of arable land, five }
hundred acres of pasture, and }
twenty acres of furze and heath, }
in the parish of *A.* in the said }
county. }

It is ordered by Common consent of *S. U.* }
attorney for the }
plaintiff, and *A.* }
G. attorney for }
John Nix, who }
claims title to }
the tenements in }
question, that the }

said *John Nix* shall be admitted defendant; and that the said *John Nix* shall immediately appear by his said attorney, who shall receive a declaration, and plead thereto the general issue this term; and that at the trial to be had thereon, shall appear in his proper person, or by his counsel or attorney, and confess lease, entry, and ouster, of so much of the tenements specified in the plaintiff's declaration, as are in the possession of the said defendant, or his tenant, or any person claiming by or under his title, or that in default thereof judgment shall be thereupon entered against the defendant *John Doe* the casual ejector; but proceedings shall be stayed against him, until default shall be made in any of the premises; and by the like consent, *It is further ordered*, That by reason of any such default, the plaintiff shall happen to be nonsuited upon the trial, the said *John Nix* shall take no advantage thereof, but shall thereupon pay to the plaintiff, costs to be taxed by the prothonotaries; *And it is further ordered*, That the assessor of the plaintiff shall be liable to the payment of costs to the said *John Nix*, by the court here to be in any manner allowed or adjudged.

By the court.

U u

N.B. This

N.B. This is signed by the lessor of the plaintiff's attorney previous to his drawing up the rule; but the defendant's attorney signs it before the plea is left.

S. U. Attorney for the plaintiff: *A. G.* Attorney for the defendant.

This rule will do for a country cause.

This rule confesses the lease, entry, and ouster.

This rule confesses the lease, supposed to be made to the plaintiff as stated in his declaration, his entry in consequence, and the ouster by the defendant: therefore the trial now stands upon the merits only; and the original declaration is now altered by inserting the name of *John Nix* the real defendant, instead of *Richard Roe* the casual ejector.

How to defend for Part.

If there be several persons who claim title, the rule may be drawn *generally*, or *particularly*: Generally, as that *J. S.* who claims title to the premises in question in his possession should be admitted defendant for such messuages; and this puts a necessity on the plaintiff to distinguish by proof what tenements are in each tenant's possession, otherwise he can have no verdict. But if the rule be drawn *specially*, that supercedes the necessity of proof that the lands are in his possession. *Buller 95.*

How to defend for part.

Originally, if you defended for part of the premises in the declaration, *the whole was mentioned in the rule*, but a note in writing was delivered to the plaintiff's attorney, *what the defendant meant to insist on at the trial*; but now you may either mention that, or mention in the margin of the rule, a particular of *that part of the premises only, which you mean to defend for*; and at the end say, "*Part of the premises mentioned in the declaration.*"

Where part only is appeared for, judgment may be signed for the residue.

When the appearance is for part only, the plaintiff having obtained the rule for judgment against the casual ejector, may sign his judgment for the residue against him.

Take your consent, rule, and plea of general issue of Not Guilty to the filacer of the county, with a *præcipe* for the appearance of the defendant thus:

Middlesex (H.) Appearance for Joseph Nix, at the suit of John Doe, on the demise of Edward Staples. Præcipe for the appearance,
He will sign your rule, and write on it, *Appearance entered: pay 2s. 6d.* then leave the plea and rule at the prothonotaries office, pay filing 2s. A memorandum or minute to be made on a 2s. 6d. stamp, and filed with the filacer.

Appearance for the tenant in possession must be entered with the filacer, and the common rule marked by him, before left in the prothonotaries office, *Barnes 178. Roe dem. Jones v. Doe*; if not, judgment may be signed. Appearance to be entered, and common rule marked,

In the Common Pleas.

Hilary term in the 34th year of the reign of King George the Third.

Nix ats. Doe on } And the said *Joseph Nix*, Plea;
the demise of Staples. } by *S. U.* his attorney comes and defends the force and injury when, &c. and says, That he is not guilty of the trespass and ejectment above laid to his charge, in manner and form as the said *John Doe* hath above thereof complained against him, and of this he puts himself upon the country, &c.

Of Landlords.

Great inconveniencies having happened by tenants refusing to appear to ejectments, or suffer their landlords to take on them the defence thereof; by *stat. 11 Geo. 2. c. 19. the court may suffer the landlord to make himself defendant, by joining with the tenant, in case he shall appear; but if the tenant shall refuse to appear, judgment shall be signed against the casual ejector for want thereof; but if the landlord of any part of the lands, &c. shall desire to appear himself, and consent to enter into the like rule, that* Landlord empowered to make himself defendant.

Those who stood behind the tenant had always a right to come in and be received *pro inter-esse suo* to de-

send the possession. 13 Ed. 1.
c. 3. 2 Inst. 344.
Bract. 393.

the tenant, in case he had appeared, ought to have done; then the court shall permit such landlord so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall further order therein.

By this statute the landlord makes himself a defendant, though the tenant refuses to appear; and though judgment is signed against the casual ejector, the court will order a stay of execution, until they make a further order.

What persons
ought to be ad-
mitted.

The court have no jurisdiction to admit any person to defend an ejectment instead of the tenant, except the landlord only; and who is landlord within the act, not every person claiming title; but one who is in some degree of possession, as receiving rent, &c. The clause of forfeiture by the tenant, if he does not give notice of declaration to his landlord, proves this. *Roe dem. Leeke v. Doe Barnes* 193. Therefore a man devised his estate to J. S. and the heir brought an ejectment against the tenant in possession. Court held J. S. could not be made a defendant. The lessor claimed under another will. *Ibid. Bull. Nisi prius* 94.

Mortgagee.

In like manner a mortgagee, who had never received the rents, has been refused to be made defendant with the tenant. *Ibid. Jones ex dem. Woodward and Williams.*

Tenant for life.

Where the landlady was tenant for life of the lands, and claimed under a marriage settlement; and in the actual receipt of the rents, &c. there was no occasion for a special application to the court.

So if she had claimed under a will, which devised to her the rents and profits of all his freehold and leasehold messuages, &c. to hold to her for life, until she should marry; and in the receipt of the rents. Lord Holt says, no man is to be admitted defendant unless he hath been in possession or received the rents, and not a mere stranger. *Comb.* 209. For more, vide my *Instr. K.* 5 edit. 557.

What

Where a dispute was between the lord by escheat and the heir, neither of whom had been in possession, court resolved, the title should be tried, and ordered the ejectment to be brought by the lord by escheat, and the heir should be admitted to defend alone, or with the tenant. *Fairclaim v. Shamtitle.* 3 Burr. 1290.

Lord by escheat

If an heir or devisee claims, he must move for that purpose on a special affidavit; an application must be made before the end of the term.

Heir, &c.

Lord Bath, the reversioner, was admitted a co-defendant. *Comb.* 339. *Jones v. Carwithin.* So a trustee may be admitted. *Ibid.* 332. So a mortgagee. But these were before the act. Lord M. says it means to exclude only mere strangers to the possession. 3 Burr. 1299.

Reversioner.

Motion that landlord might be made defendant, without tenant in possession, who refused to appear, denied; but common rule granted to add landlord to the tenants. *Barnes* 172. *Baldebridge v. Paterson.*

Landlord cannot be made defendant without tenant.

In cases where landlord is permitted to defend without tenant, the reason of judgment against the casual ejector, by statute, is, That under it, after an end of the suit, the plaintiff may obtain possession of the premises sued for, which he could not do by virtue of a judgment against a person out of possession.

In cases where landlord is permitted to defend without tenant, the reason of the judgment against casual ejector.

But where a writ of error is brought, there is not the least reason to give plaintiff leave to take possession till after a determination in error. *Farrside* against *Hayley.* *Barnes* 208.

It seems right for the landlord to appear before the judgment is signed against the casual ejector, to prevent the ill consequence of taking possession immediately after. *Hobson v. Dobson,* *Barnes* 179.

Landlord to appear before judgment signed

Although the landlord is admitted by a special rule of the court to defend, yet he must enter into the common consent rule. *Barnes* 187. *Goodtitle v. Thrusout.* For he is considered in all respects the same as tenant in possession.

Landlord must enter into the common rule.

For part.

A landlord may be admitted to defend for *part* of the premises in his tenant's possession. *Roe dem. Gobard v. Doe. Barnes* 179.

A landlord may defend for the part *his tenant holds*, and the rule will express this specially.

If landlord of one tenant appears.

If landlord is added to one tenant who appears for part, and defends alone for other part where tenant refuses to appear, plaintiff shall have judgment for this last part against casual ejector, with stay of execution. *Barn. 179. Roe v. Doe.*

How to appear for the Landlord of Tenant in possession.

Defence for the landlord.

Give brief to serjeant for him to move, "That the LANDLORD may be made defendant with the TENANT, if he appears, and if the tenant does not appear, then that he may appear by himself, and enter into the common rule, and defend his title." Serjeant 10s. 6d. N. B. This is done by a serjeant's hand, and there needs no affidavit for the purpose, unless in the particular matters stated, as mentioned in the books; draw up the rule with the secondaries, pay 9s. 6d. copy it, and annex it to the plea: "Add also the common consent rule thereto:" in which you will insert "both names, if tenant appears," and file appearance and plea as before; if tenant does not appear, then only the landlord's name.

Landlord's rule to defend for all.

Monday the 24th of June. It is ordered, That A. B. landlord of the premises in question, be joined and made defendant together with C. D. tenant in possession of the premises in question in the common rule by consent in ejectment, instead of the casual ejector, in case the said C. D. shall appear: And it is further ordered, that in case the said C. D. shall neglect to appear, the said A. B. may appear by himself and defend his title to the premises in question, pursuant to the late act of parliament, he hereby consenting to enter into the like

Like rule, that the said *C. D.* by the course of the court, in case he had appeared, ought to have done: *Nevertheless*, the plaintiff shall be at liberty to sign judgment against the casual ejector, but execution is hereby stayed, until this court shall make further order therein: and by consent of counsel for the said *A. B.* It is further ordered, That the said *A. B.* upon the trial to be had shall admit himself to be in the actual possession of the said premises. On the motion of Mr. Serjeant *Adair* for the said *A. B.*

By the Court.

Formerly the landlord was obliged to obtain a rule to shew cause; but in *Michaelmas* term, 12 Geo. 2. the rule was ordered to be absolute, and not to shew cause. *Barn.* 185. *Fenn v. Marriott.*

Formerly a rule to shew cause.

The plaintiff must draw up his rule for judgment against the casual ejector, and sign judgment against him, in this case.

Rule must be drawn up.

Where the landlord appears without the tenant, it is necessary to prove the tenant in possession of the premises, for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession, and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. *Smith v. Mann dem. Taylor.* 1 *Wils.* 220.

If the landlord is made defendant, plaintiff must prove defendant's tenant in possession.

Although judgment be signed against tenant for non-appearance, yet if he did not deliver the ejectment to his landlord, the landlord may move on affidavit to be let in to defend under terms, and order tenant to pay the costs. *Vide 4 Burr.* 1996.

Where landlord may be let in to try.

For the future, let rules for leave to take out execution by the plaintiff against the casual ejector, after verdict against the landlord, made defendant instead of the tenant in possession, pursuant to the act, be absolute, and not to shew cause. *Fenn v. Marriott.* *Barnes* 185.

Order of the court.

Where the landlord enters into the rule to confess, and does not appear at the trial to confess,

If landlord does not appear at trial to confess,

lease, entry, and ouster, whereby plaintiff is non-suited; plaintiff on producing the *postea*, may move for leave to take out execution against the casual ejector, upon the judgment signed by virtue of the special rule to defend, which is absolute. *Stiles v. Oakes. Barnes 182.*

I should think you should have an office copy of the landlord's rule to move on.

If error brought, when to shew it for cause against the execution.

If the *landlord* appears alone, and after judgment for plaintiff brings error, plaintiff cannot have execution till error determined, *Str. 1241*; but the proper opportunity for the landlord to make his stand against the execution is, by shewing *this* for cause against the motion. If he omits this opportunity, the execution regularly issued shall not be set aside. *Vide Burr. 757.* Therefore as the rule is absolute in the first instance, there ought to be notice of the motion given, or how can he shew it for cause.

How to proceed to Trial after Plea.

How to proceed after appearance and plea, to trial.

The consent rule is to be taken away with the plea from the prothonotaries, then sign the name of plaintiff's attorney to the common consent rule over that of the defendant's attorney, carry it to the secondaries office who files it, and will draw up two rules on stamp, one for each party, for which pay 9s. 6d.; then make up the issue, engross same on a treble 1d. and deliver it to defendant's attorney, with the usual notice of trial; charge 4d. per sheet and stamps, half consent rule, and *li. lo. libertas interloquendi*: if he pays for the issue, proceed as in other cases; if not, then sign judgment against the defendants who have appeared, but not against the casual ejector. *Fenn v. Jolly. Barnes 253.*

Of Issue.

You cannot alter the declaration in the issue from the first delivered, only in defendant's name unless

unless there be an order for that purpose. Lord Ray. 1411.

The form of the issue is the same as others, only Issue. say, instead of a plea of trespass on the case, "*in a plea of trespass and ejectment*;" and the same time for notice of trial is also allowed.

You make up the issue the same term as the appearance and plea is of; and if not paid for, sign judgment, Barnes 253. against defendant, not the casual ejector.

Of Infant Lessor.

If the lessor of the plaintiff is an infant, after the plea is filed, you may move the court, or have a summons, to shew cause why further proceedings should not be staid until some person on behalf of the lessor of the plaintiff gives security for payment of the defendant's costs, in case of a nonsuit, or a verdict for the defendant, the lessor of the plaintiff being an infant. Barnes 183.

Infant lessor must name a guardian, and give security for costs.

Of making up the Record.

The record in ejectment must have the first placita of the same term the issue is joined; and in the jurata say, "*in a plea of trespass and ejectment*;" leave room for another placita as in other records. If the plaintiff obtains a verdict, you stay the four days as in other cases; and if no motion for a new trial or arrest of judgment, tax the costs on the postea after it is stamped, as in other cases.

After issue joined and delivered, and before the record was sent down, one of the defendants died: If one of two defendants die, the suggestion of the death was mentioned in the jurata, and held to be right. The venire was to try the issue as between the surviving defendant. Far v. Denn. 1 Burr. 362. All may be made right afterwards on the roll. It is enough on the nisi prius record, to shew and notify what issues there are to try, and between whom. 366.

The vill in which the demised lands lie, though Vill. omitted in the declaration, shall, after verdict for the

the plaintiff, be collected from the *vill*, in which the ejection is laid to have been committed. 2 *Black. Rep.* 706. *Goodwright v. Strother*.

Special verdict.

On a *special verdict* it ought to appear that the lessor of the plaintiff might enter, at the time he brought the ejectment. 1 *Burr.* 119.

Not to discontinue.

After special verdict the court will not give leave to discontinue, in order to adduce fresh proof in contradiction to the verdict. 2 *Black. Rep.* 813. *Gray v. Gray*.

Title at an end.

If there be a special verdict, and plaintiff's title at an end, court cannot stay the proceedings, for he may proceed for damages and costs. *Str.* 1056.

New trial.

In ejectment, it is said, that where matter of title is in dispute, and defendant obtains a verdict, a new trial is always denied. *Barn.* 440.. But Mr. J. *Yates* said, new trials are often granted in ejectment cases, as well as others, where the party praying a new trial would suffer by a change of possession. 4 *Burr.* 2225. So said *Lord Mansfield*.

Attachment in first instance, not delivering possession.

In ejectment, an attachment was granted absolute in the first instance, against the tenant in possession, on affidavit that he had been served with a rule of court made absolute for delivering up the possession, and had refused so to do. *Davies v. Dos.* 2 *Black. Rep.* 892.

*Of staying Proceedings till Costs paid of a former Ejectment.***Proceedings in ejectment shall stay till the costs of a former ejectment paid in which the lessor of the plaintiff never entered into the consent rule.**

Motion to stay proceedings in this ejectment, till the costs of two former brought on same title were paid; and it was alledged that in those, upon the tenants entering into the common rule, the lessor of the plaintiff had neglected to enter into the consent rule, and no further proceedings were had, which was very vexatious and oppressive to the tenant in possession, as there was nobody of whom he could recover his costs. Cause shewn was, that this was a new attempt, as no costs were payable till the lessor of the plaintiff joins in the consent

consent rule. *De Grey, C. J. and tot. cur.* We think this application very just and reasonable. It is said that a lessor of the plaintiff is not made answerable for costs by the tenant, or a new defendant entering into the common rule, till he himself joined in the consent rule by signing it, and thereby making his option to proceed against the new defendant; this, whether reasonable or not, has given rise to the present doubt: but we think, that whatever foundation there may be for the practice alluded to, yet, when the court sees manifest vexation and oppression, as in the present case, it will exercise its jurisdiction over this fictitious proceeding, to prevent it. *R. absol. Smith v. Barnardiston. 2 Black. Rep. 904.* So is the practice in K. B. *1 Term Rep. 491.*

An ejectment had been brought in the K. B. between the same parties, when in *Hilary* term, 13 *Geo. 3.* defendant obtained rule for costs for not proceeding to trial, which were taxed at 85*l.* 8*d.*; after which the cause was tried in same term by a special jury, and verdict for defendant, and costs taxed at 273*l.* 10*s.*; total 358*l.* 10*s.* 8*d.*; no part of which was paid. Motion to stay proceedings in this cause till the costs of the former were paid, and made 13th of *June*; notice of trial for the 19th, and witnesses all ready. *Walker* shewed for cause, that the cause was so clear at the last trial, and the parties had rested so long, that they did not think them in earnest till notice given. The defendant then proceeded to tax his costs, in order to ground the application, which he otherwise would not have done, the lessor being insolvent. Rule absolute. *Doe dem. Chadwick v. Law. 2 Black. Rep. 1158.*

Proceedings staid the day before trial, till the costs of a former ejectment in *B. R.* paid, after a long delay, lessor insolvent.

How to proceed if there be a Nonsuit or Verdict.

If the tenant on the trial or defendant will not appear and confess *lease, entry, and ouster*, the course of the court is to call the defendant to confess,

If tenant will not confess, how the course of the court is.

sels, &c. and his attorney, if he be within the rule and then to call the plaintiff and nonsuit him, and pray to have it indorsed on the *possea*, which intitles the plaintiff to judgment. And the ancient practice was, not to sign judgment against the casual ejector until the *possea* was returned into court; and so is the practice in the King's Bench the court holding, that after such nonsuit the plaintiff must wait until the *possea* come in on the day in bank. 2 *Term Rep.* 780. But in the case of *Throgmorton v. Bentley*, H. 17 Geo. 3. in this court, the court held, that immediately after the trial, where the plaintiff is nonsuited for want of confessing lease, &c., he may enter up judgment against the casual ejector, and take out execution. Lord Kenyon said, he thought the mode adopted in the B. R. was the right one, though this court differed. *Salk.* 259. *Sty. Praet. Reg.* 442. 1 *Keeble* 249. with the K. B.

The courts differ in their practice as to taking out execution.

Nonsuit for not confessing how to proceed.

Where the plaintiff is nonsuited, by reason of the defendant's not confessing lease, entry, and ouster, the costs are taxed on the rule by consent and judgment signed against the casual ejector, the same as if no plea had been pleaded. *Barnes* 182. *Goodwright v. Vice.*

On the first day of the term, in a country cause get the record from the associate, take same with the consent rule and the judgment paper to the prothonotary; he will tax the costs on the rule by consent: make a copy of same, with the allocatur for costs, serve defendant therewith, and demand the costs; shew the original rule and allocatur; if not paid to the lessor, he may, on affidavit of these facts, move for an attachment.

If plaintiff nonsuited on merits, may pay the costs to which defendant he pleases.

Verdict for plaintiff, may have a *ca. fa.* or *fi. fa.*

If the plaintiff be nonsuited on the merits, he may pay the costs to which of the defendants he pleases. *Str.* 516.

If there be a verdict for the plaintiff, he may have a *ca. fa.* or *fi. fa.* for the costs, and a writ of

hab. fac. poss. afterwards, or writ of possession *fi. fa.* for *ca. fa.* together, in one writ.

If Verdict for Defendant.

Where a verdict in ejectment is for the defendant, or the plaintiff becomes nonsuited upon evidence, a *ca. fa.* need not be made out against the plaintiff, and shewn to his lessor; but the costs being taxed, a demand must be made on the lessor of the plaintiff personally, either by the defendant, or his attorney on record, named in the consent rule; and if not paid, you may move for an attachment on an affidavit of both defendant and his attorney of such demand, and that the lessor refused to pay the same, and that the same now remains unpaid.

Vide near the form of this, p. 380.

The lessor of the plaintiff dies before the commission day of the assizes, cause called on, and plaintiff nonsuited, because defendant did not confess, &c. Motion that the court might allow the executor costs; court held, that the executor was not intitled to the costs. *Thrustout v. Bedwell.* 2 Wils. 7.

Verdict for defendant.

If lessor dies before commission day.

If there are several defendants for the same premises, and some appear and confess, but others do not, the practice is, to proceed against those who do appear, and to enter a verdict for the rest; but then the cause of that verdict is indorsed on the *poslea*, which, as to them, intitles the plaintiff to judgment against the casual ejector. *Ld. Raym.* 729.

If there are several defendants, and some appear and confess, and others do not, how the *poslea* ought to be indorsed.

One of the defendant's confessed lease, &c. and a verdict found against him for one third; the other defendant did not confess. Motion for costs, which in this case, plaintiff could not have on the common consent rule. Rule absolute. *Goodwright v. Frigurtha.* Barnes 121.

One defendant confessed, verdict against him; the others did not confess.

Motion for judgment against the casual ejector as to some of the defendants, by reason of their not confessing lease, &c. as appeared by the *poslea*, plaintiff

May sign judgment against the casual ejector as to those who do not confess.

plaintiff having obtained a verdict against the others who did confess. Rule absolute. *Ellis v Knowles. Barnes 174.*

Of the Judgment.

Destroys the right of possession in the adverse party.

A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party, but gives a *right of possession* to the *recoveror*: and if the judgment did not produce this effect, the lessor of the plaintiff could not enter, or be intitled to the writ of possession; but his having a *right to enter* and to sue out that writ, infers his *right* to the possession. Whilst the judgment stands in force, it removes an intervening estate out of the way; and during that time, it is the same thing as if it never existed, and the recoveror's right to the possession will continue till the judgment is reversed by error, or falsified in another action. *1 Burr. 89.*

The recovery of the possession.

A judgment in ejectment is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may afterwards appear even between the same parties. He who enters under it in truth and substance, can only be possessed according to right. *1 Burr. 114.*

If brought for a moiety, may recover a third.

If an ejectment be brought for a moiety, and the lessor appears to have but a third, he has a right to recover according to his title. *1 Burr. 329. 1 Sid. 229.* If there be a demand for forty acres, you may recover twenty. *Ibid.*

Tenant concluded by the judgment.

The tenant is concluded by the judgment, and cannot controvert the title: consequently he cannot controvert the plaintiff's possession, because his possession is part of his title; for the plaintiff cannot intitle himself to recover in an ejectment, must shew a *possessory right*, not barred by the statute of limitations.

The judgment concludes the parties as to the subject matter of

This judgment, like all others, only concludes the parties as to the subject matter of it: therefore beyond the time laid in the demise, it proves nothing.

thing at all; because beyond that time, the plaintiff has alledged no title, nor could be put to prove any. As to the length of time the tenant has occupied, the judgment proves nothing; nor as to the value. 2 Burr. 668. There is no distinction between a judgment on *verdict*, or by *default* in ejectment. *Ibid.* 133.

it; but not beyond the time of the demise.

On two demises, if the judgment be to recover *Terminus suum*, in the singular it is good. *Str.* 833. *Wile* 908. and 1180. 1 *Wils.* 1.

Two demises

And the said *Richard*, by *S. U.* his attorney, comes and defends the force and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *John Doe*, but makes default, by which the said *John Doe* remains therein undefended against the said *Richard Roe*. Therefore it is considered that the said *John* recover against the said *Richard* his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and upon this the said *John* freely here in court remits to the said *Richard*, all such damages, costs, and charges, as he the said *John* hath sustained, by occasion of the trespass and ejectment aforesaid, therefore the said *Richard* is free from those damages, costs, and charges, &c.; and upon this the said *John* prays the writ of our Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have his possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted to him, returnable here in —

Judgment by nil-dicit, with a remittitur damper

The judgment on verdict is entered by Mr. *Lickbarrow* after the costs are taxed.

Of the Writ of Possession.

If the lessor of the plaintiff has judgment in ejectment, it is to recover the term, upon which a writ of *habere facias possessionem* issues, directed to the sheriff of the county where the *venue* is laid, to put the plaintiff into the peaceable possession of his term;

term; in the execution of which the sheriff may take with him the *posse comitatus*, and may justify breaking open doors if the possession is not delivered quietly. 3 *Black. Com.* 412. 5 *Co.* 91. Also he may remove all persons in the house, and ought so to do. 1 *Lev.* 145. *Vide my Office of Sheriff.* 177. The sheriff delivers the possession at the shewing of the plaintiff; if he takes more than he ought, the court will set it right. 5 *Burr.* 2673.

Sci. fa.

If a year and a day elapse after judgment, there must be a *sci. fa.* *Salk.* 258.

If lessor die, it is no abatement.

If the lessor of the plaintiff die, it is not an abatement: and where he died 1st of *March*, after which the writ of possession was taken out, but tested the last day of *Hilary* term, it was held good. 4 *Burr.* 1970.

A writ of possession.

George the Third, &c. to the sheriff of *Middlesex*, greeting: Whereas *John Doe*, lately in our court, before our justices at *Westminster*, by the consideration of the said court, recovered against *Richard Roe* his term yet to come, of and in one messuage, &c. (*here describe the parcels as in the ejectment exactly*), with the appurtenances, situate, lying, and being in _____ in your county, which *John Charles*, on the 2d day of *April*, in the 33d year of our reign, demised to the said *John Doe* for a term of years which is not yet expired, to hold from the 1st day of *April* then last past, until the full end and term of five years from thence next ensuing, and fully to be complete and ended; by virtue of which demise, the same *John Doe* entered upon the same tenements with the appurtenances, and was possessed thereof, until the said *Richard* afterwards, to wit, on the same 2d day of *April*, in the 33d year aforesaid, with force and arms entered into the said tenements, with the appurtenances, and then and there ejected, drove out, and removed him the said *John Doe* from his said farm, his said term then and there not being expired, and him the said *John Doe* hath withheld from his possession thereof, and still doth withhold, whereof the said *Richard* is com-
victed

N.B. To be ingrossed on a 2s. 6d. stamped parchment, pay signing 1s. 4d. seal 7d.; no præcipe.

visited: therefore we command you, that without delay you cause the said *John Doe* to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid with the appurtenances, and in what manner you shall have executed this our writ, make appear to our justices at *Westminster*, on the morrow of *All Souls*, and have there this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

The plaintiff in ejectment as tenant in common, recovered possession of five-eighths of a cottage with the appurtenances, and a writ of possession was executed by the sheriff, who turned the tenant out of the whole, and locked up the door. *Cur.* This is wrong, the writ ought to have pursued the verdict. Let there be a rule upon the sheriff, and the lessor of the plaintiff, to restore the tenant to the possession of three-eighth parts of the premises, otherwise he would be forced to bring another ejectment for the same. *Roe ex dem. of Saul v. Dawson.* 3 *Wils.* 49.

George, &c. (go as far as the return day), then say, We also command you, That of the goods and chattels of the said *C. D.* in your bailiwick, you cause to be made 26*l.* which were adjudged to the said *John Doe*, by the consideration of our said court of the bench, for his damages, costs and charges expended about his suit in this behalf, according to the form of the statute in that case made and provided; and have you the said monies before our justices at *Westminster*, at the said time, to render to the said *John Doe*, for his said damages and costs, whereof the said *C. D.* is also convicted; and have there this writ. Witness, *&c.*

To be ingrossed on a 2*s.* 6*d.* stamped parchment, and signed with the prothonotaries, pay 1*s.* 4*d.* seal 7*d.* no *præcipe* is requisite.

The sheriff grants a warrant on this writ; pay 2*s.* 4*d.* and he will put the lessor of the plaintiff in possession. Warrant and pound.

X x

And

Ejectment for five-eighths, sheriff gave possession of the whole, tenant shall be restored to three-eighths.

Writ of possession, and *fi. fa.* for costs.

And the sheriff is to have 12*d.* for every 20*l.* of the yearly value if it does not exceed 100*l.* and 6*d.* over and above the said yearly value of 100*l.* 3 *Geo.* 1. c. 15. s. 16. *Vide my Office of Sheriff, 176.*

The writ of possession will serve for a real tenant.

Relicta verificatione,

The above writ will serve where judgment is obtained against a real defendant, only insert the real tenant's name.

Frequently the defendant, after entering into the common rule, wishes to withdraw his plea, and confess the action; in that case you must enter a *relieta verificatione* on the roll, which is a relinquishment of his plea, and thereupon the plaintiff may enter judgment.

The tenants very frequently, to save the expence of sheriffs poundage and officers fees, attorn tenants to the lessor of the plaintiff; in that case, make such attornment on a piece of paper, thus (naming the cause):

Attornment.

To be taken on a 6*s.* stamp.

Be it remembered, that we whose names are hereunder written, being the several tenants in possession of the premises belonging to J. G. situated and being in the parish of, &c. do hereby severally attorn tenants to A. B. of, &c. gentleman (*the lessor of the plaintiff in the above cause*), for such parts of the said premises as are in our respective possessions; and we, each, and every of us, have this day severally paid to the said A. B. the sum of 1*l.* upon such attornment, on account, and in part of the rent due, and to become due from us severally and respectively, for and in respect of the said premises; and we do severally and respectively become tenants thereof to the said A. B. from the 25th day of *March* last past; as witness our hands, this

day of 1793.

Writ of possession on two several demises.

George, &c. To the sheriff of *Middlesex*, greeting: Whereas A. A. lately in our court, before our justices at *Westminster*, by the consideration of the said court, recovered against R. R. late of, &c. his term yet to come of and in five messuages, and

one acre of land, with the appurtenances, in the parish of Saint *Luke* in your county, which *J. H.* on the 2d day of *April*, in the 33d year of our reign, at the parish of Saint *Luke* aforesaid, demised to the said *A. To have and to hold* the tenements aforesaid, with the appurtenances to the said *A.* and his assigns, from the first day of *April* then last past, to the full end and term of five years then next following, and fully to be complete and ended; by virtue of which demise, the said *A.* entered into the said tenements with the appurtenances, and was possessed thereof; and the said *A.* being so possessed thereof, the said *R.* afterwards, (*that is to say,*) on the said 2d day of *April*, in the 33d year aforesaid, with force and arms, (*that is to say,*) with swords, staves, and knives, at the parish of Saint *Luke* aforesaid, in your county, entered into the said tenements, with the appurtenances, which the said *J. H.* demised to the said *A.* in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *A.* out of his said farm: And whereas, the said *A.* lately in our same court, before our justices at *Westminster*, by the consideration of the said court, recovered against *R. R.* his term yet to come of and in five other messuages, and one other acre of land, with the appurtenances, in the said parish of Saint *Luke*, in your county, which *J. M.* on the said 2d day of *April*, in the 33d year of our reign, at the parish of Saint *Luke* aforesaid, demised to the said *A. To have and to hold* the said last-mentioned tenements, with the appurtenances, to the said *A.* and his assigns from the 1st day of *April* then last past, to the full end and term of six years then next following, and fully to be complete and ended; by virtue of which demise, the said *A.* entered into the said last-mentioned tenements, with the appurtenances, and was possessed thereof: and the said *A.* being so possessed thereof, the said *R.* afterwards, to wit, on the said second day of *April*, in the said 33d year, with force and arms, (*that is to say,*) with swords, staves,

Pay signing 8d.
per sheet for each
demise after the
first.

2d demise.

and knives, at the said parish of Saint Luke, in your county, entered into the said last-mentioned tenements, with the appurtenances, which the said *J. M.* demised to the said *A.* in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *A.* out of his said farm last-mentioned. Therefore we command you, that without delay, you cause the said *A.* to have his possession of his said several terms yet to come, of and in the several tenements aforesaid, with the appurtenances; and that you certify to our justices at *Westminster*, on the morrow of *All Souls*, in what manner you shall have executed this our writ, and have you there this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of June, in the 33d year of our reign.

Proceedings under Stat. 4 Geo. 2.

If half a year's rent be in arrear, and landlord hath a right to re-enter, he may, without any formal demand, serve declaration, &c.

and affidavit to be made.

That in all cases between landlord and tenant as often as it shall happen, that one half year's rent shall be in arrear, and the landlord or lessor hath a right by law to re-enter, for non-payment thereof, the landlord shall, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case no tenant be in actual possession, then to affix the same upon the door of any demised messuage, or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, &c. comprized in such declaration; and such affixing shall be deemed legal service, which shall stand in the name and place of formal re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the court, where the suit is depending by affidavit or to be proved upon the trial, in case the defendant appears, "that half a year's rent was due by the said declaration was served, and that no sufficient distress was to be found on the demised premises, com-

waiting the arrear, then due; and that the lessors or lessor in ejectment had power to re-enter," then the lessor shall recover judgment, and have execution; which if the lessee suffer, without paying the arrears and costs, and without filing a bill in equity, to be relieved *within six months*, he shall be barred from all relief, other than by writ of error; and the lessor shall hold the premises discharged from the lease; but if the tenant or lessee tender to the lessor, or bring into court the rent in arrear, together with costs, all further proceedings shall cease: and if the lessee be relieved in equity, he shall enjoy the demised premises, according to his lease, without obtaining a new one. *N. B.* This is not to bar the right of a mortgagee, who may pay the rent in arrear within six months, and costs. 4 Geo. 2.

If lessor recover, and lessee does not pay arrears and costs, and file a bill within six months, to be barred.

c. 28. s. 2.

If the lessee file a bill in equity for relief, he must bring into court in forty days after the lessor's answer, so much as he shall swear to be due, over and above the costs, there to remain till hearing.

If lessee file bill he must bring money into court.

Ibid. sect. 3.

Provided, if the tenant shall before the trial pay, or tender to the lessor, &c. or pay into court all the rent, with costs, further proceedings shall cease.

Proviso.

sect. 4.

If the tenant is served with a declaration in ejectment upon this act of parliament, he may apply by summons to stay proceedings, upon payment of the rent and costs to be taxed, or to the court. *Cooke's Rep.* 6. *Anon.*

Tenant may apply to pay rent, &c.

An actual entry is not necessary in this case to maintain this ejectment. *Dougl.* 485. 2 *Ld. Ray.* 750. 1 *Salk.* 259. A demand of the rent is necessary, 2 *Ld. Raym.* 751. *Dougl.* 486, provided it is so stipulated in the lease: where there is no stipulation for entry without demand, you may enter without demand.

An actual entry not necessary.

The ejectment is prepared as before, (it is not necessary to seal a lease,) laying your demise after the rent became due, which is generally *twenty*

Ejectment how to be prepared.

X x 3

days

days after the quarter ended; after service thereof, the following affidavit is necessary, naming the cause:

**Affidavit to move
for judgment,**

J. K. the lessor of the plaintiff in this cause, and *J. B.* of, &c gentleman, severally make oath and say; and first, this deponent *J. B.* for himself saith, That on the day of last past, and for several days before, the messuage in the annexed declaration of ejectment mentioned, was shut up, and there being no tenant in the possession thereof, he this deponent did, on the

day of last, affix a copy of the said declaration in ejectment hereto annexed, and the notice thereunder written, upon the door of the said messuage, late in the tenure of the said *A. B.* And this deponent *J. B.* for himself saith, That before such declaration in ejectment was affixed as aforesaid, there was due to him as landlord of the said premises, from the said *A. B.* the tenant thereof, the sum of 14*l.* for half a year's rent, upon and by virtue of a certain indenture of lease, bearing date the day of 1793, and made between this deponent of the one part, and the said *A. B.* of the other part; and that no sufficient distress was then to be found upon the premises, countervailing the arrears of rent then due to this deponent: And this deponent further saith, That he had, at the time of affixing of the said declaration in ejectment upon the door of the said messuage, power to enter on the same, for the non-payment of the rent so in arrear as aforesaid.

**Substance of the
affidavit required
for the landlord
to make.**

It appears in *Cooke's Rep.* 68. That the affidavit required in this case is in substance as follows, *That declaration was fixed upon such a place, being the most notorious part of the premises in question (there being no person in possession on whom the declaration could be legally served); that half a year's rent was then due from the late tenant; that no sufficient distress was to be found upon the premises, to answer the arrears then due; that the late tenant held such premises by virtue of a lease from the lessor of the plaintiff,*

plaintiff, and that therein is contained a clause of re-entry for non-payment of that rent. *Pract. Reg. C. B.* 168.

You move upon this affidavit as before, for judgment against the casual ejector, pay serjeant's fee 10s. 6d.; and if no appearance and plea, sign judgment.

How to move for judgment.

But if the tenant appears, and pleads upon the trial, all the matters in the above affidavit must be proved. *1 Burr.* 614.

If tenant appears and pleads, what proof requisite.

A declaration was delivered 4th Dec. 1770, but on the 7th of Nov. preceding, the tenant in possession had tendered his rent, which was refused by lessor of plaintiff, because he had put the affair in an attorney's hands. On 23d of November it was again tendered before witness, and refused. The tenant left the money in his landlord's bakehouse, in his presence. Motion to set aside the proceedings with costs: *Court ordered*, that as the tender was made before notice of the action, the rule absolute. *Goodright v. Noright.* 2 *Black. Rep.* 746

Tender before ejectment delivered, good, and proceedings set aside.

Rule absolute to stay proceedings on payment of the rent due to lessors as devisees, and costs. *Duckworth v. Tunstall.* *Barnes* 184.

Of proceeding by a Mortgagee.

The mortgagee having a right of entry, and the premises be tenanted, may serve an ejectment on the tenants as before; but if the premises are vacant, he must seal a lease thereon, in order to nominate a plaintiff, who is to be turned out by a defendant, as mentioned before; and the proceeding is exactly the same.

Of proceeding to recover premises by a mortgagee.

By Stat. 7 Geo. 2. c. 20. It is enacted, That where an ejectment is brought by a mortgagee to recover the possession of mortgaged premises, if the person who has a right to redeem, shall appear and pay to the mortgagee, or bring into court, the principal, interest, and costs, to be computed by the proper officer, he shall

If an ejectment is brought by a mortgagee, the mortgagor may apply, &c.

be discharged from the mortgage; and the court shall, by rule, compel the mortgagor to reconvey the premises, and to deliver up all deeds relating to the title of the same.

Mortgage and two bonds.

If there be a mortgage and two bonds which were a lien upon the estate, the defendant cannot pay off mortgage, unless he pay also the amount of the two bonds. *Barnes* 177. *Felton v. Ash*.

A judge's order will do.

A judge's order may be had for this purpose, and the prothonotary is to make all just deductions and allowances, on paying of the mortgage money. *Barnes* 176. *Goodright v. Moore*.

Where there are two or more mortgages, court will not compel a redemption of one only.

When there are two or more mortgages, the court will not stay proceedings and compel a redemption of the first mortgage only, upon the payment of the principal, interest, and costs on that mortgage, without paying the rest. 2 *Black. Rep.* 726. *Roe v. Soley*.

Further Judgments in Ejectment.

Final judgment after verdict for the plaintiff.

To be inserted after the postea.—At which day cometh here as well the said *John Doe* as the said *A.* by their attornies aforesaid; and upon this the premises being here seen, and fully understood by the justices here, It is considered, That the said *John Doe* recover against the said *A.* his term aforesaid yet to come, of and in the tenements aforesaid with the appurtenances, and his damages aforesaid, assessed by the said jury in form aforesaid, and also 43*l.* 19*s.* adjudged to the said *John*, by the court here, by his assent, by way of increase, which damages amount in the whole to 46*l.*; and that the said *A.* be taken, &c. And upon this the said *John Doe* prays the writ of the Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have his possession of his said term, yet to come, of and in the said tenements with the appurtenances; and it is granted to him returnable here, from the day of *Easter* in fifteen days, &c.

Hab. fac. possess. prayed.

Enter on the roll as far as to the end of the issue, then say, At which day before our said justices at Westminster came the parties aforesaid by their attorneys aforesaid, and the sheriff did not send the said writ, nor did he do any thing thereupon; and hereupon the said C. D. by his said attorney, comes and relinquishes his averment by him in pleading above pretended, and says, That he cannot deny the said action of the said *John Doe*, nor but that he is guilty of the trespass and ejectment aforesaid, in manner and form as the said *John Doe* hath above thereof complained against him; and the said *John Doe* further saith, and acknowledges, That he hath sustained damages, by reason of the trespass and ejectment aforesaid, besides his costs and charges by him laid out about his suit in this behalf to 1 s. and no more; and because the said C. D. doth not deny the same, but admits the allegation of the said *John Doe* to be true, the said *John* prays judgment, and his damages so acknowledged in form aforesaid, together with his costs and charges aforesaid, may be adjudged to him, &c. Therefore it is considered, That the said *John Doe* recover against the said C. D. his term aforesaid, yet to come, of and in the tenements aforesaid, with the appurtenances, and the said 1 s. damages in form aforesaid acknowledged, and also 7 l. 10 s. for his costs and charges by him laid out and expended about his suit in this behalf, adjudged to the said *John* by his assent, by the court here, which said damages, costs, and charges, in the whole, amount to 7 l. 11 s. and that the said C. be taken, &c. And the said *John* prayeth the writ of the said Lord the King, to cause him to have his possession of the term aforesaid, yet to come, of and in the tenements aforesaid, with the appurtenances, and it is granted to him returnable here, in fifteen days of *Easter*.

Judgment in ejectment after defendant has withdrawn his plea and costs taxed, and also for the possession.

Judgment signed
day of
1790.

Mesne Profits.

If judgment is obtained in ejectment, bring an action for the mesne profits; and as it is consequential

How to recover them, and from what time, and

in whose name
action to be
brought.

quential to the recovery, it may be brought either in the name of the nominal plaintiff, or in the name of *the lessor of the plaintiff*, and in either shape it is equally his action, against the tenant in possession, to recover the value of the profits, unjustly received by the tenant, in consequence of the ouster complained of in the ejectment; for after a recovery in ejectment, the tenant is estopped from controverting the plaintiff's title, in a subsequent action for the mesne profits, provided the plaintiff only proceeds for mesne profits, *from the time of the ouster complained of in the ejectment*; but if he proceed for *antecedent profits*, he must prove his title to the premises, from whence they arose, to shew his right to receive them. 2 Burr. 668. Barnes 87. *Treshern v. Gressingham*. Bull. 87.

Proof required
in such action.

In order to prove the plaintiff's title, it is only necessary to produce the office copy of the judgment in ejectment, where the judgment is after verdict, together with the attorney's bill; but if by default, then a writ of possession executed is necessary; but a learned author says, That the latter does not seem requisite; for if the tenant be concluded by the judgment in ejectment, from controverting the plaintiff's title, he is consequently concluded from controverting his possession, because his possession is part of his title. *Gillb. Ejectm. by Runn*. As to the value of the mesne profits, they must be proved; but in estimating that value, the jury are not confined to the mere rent of the premises, for they may give whatever damages they think proper. 3 Wils. 121. *Goottile v. Tomb*. Though the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years. Bull. Ni. Pri. 87.

Jury are not
confined to mere
rent.

Devisee the profits.

It is said, if a man makes his will and dies, the devisee will not be intitled to the profits till he has made an actual entry. *Esp. L. N. P.* 223.

Damages.

Damages ought to be given for no longer time than defendant is proved to be in actual possession. Plaintiff's possession ought also to be proved, and from

from that time only damages to be recovered.

Stanynought v. Cousins. Barnes 456.

If one tenant in common recovers in ejectment against another, he may have an action for the mesne profits. 3 *Wils.* 118. *Goodtitle v. Tombs.*

Tenants in common may have this action.

The defendant cannot pay money into court in an action for mesne profits. 2 *Wils.* 115. Because this is a trespass for a tortious occupation, *Haldfast v. Morris.*

Cannot pay money into court,

In an action for the mesne profits, brought pending a writ of error on the ejectment, plaintiff may proceed to ascertain his damages, and to sign his judgment; but *Cur.* will stay execution thereon, till the writ of error on the judgment be determined. *Harris v. Allen, Cooke's Rep.* 46.

Action for the mesne profits, pending a writ of error.

On motion in the treasury, that defendant might be held to bail upon affidavit in an action for mesne profits, the judges ordered defendant *Motteram* to be held to bail for 500*l.* but would not order the other defendants to be held to bail, they being only his under tenants. *Pract. Reg. C. P.* 62. *Duncombe v. Motteram.*

Defendant held to bail for the mesne profits.

In ejectment, a writ of *habeas corpus* is the proper process to remove the plaint, (under which the defendant must appear in this court, and enter into the common rule, and plaintiff must declare *de novo*;) and not a writ of *certiorari*, as in replevin, whereby, after the record removed, the parties are to proceed upon it, and not to begin *de novo*. *Barnes* 421. *Higmore v. Barlow. Fitz. N. B.* 557. letter L.

How to remove an ejectment from the Lord Mayor's court, London.

Bankrupts.

Bankrupts imprisoned after certificate allowed, how to be discharged.

IF any bankrupt who shall have obtained his certificate, and such certificate shall have been allowed and confirmed, shall be taken in execution or detained in prison, on account of any debts due or owing before he became bankrupt, by reason that judgment was obtained before such certificate was allowed and confirmed, it shall be lawful for any one or more of the judges of the court wherein judgment has been so obtained against such bankrupt, on such bankrupt's producing his certificate allowed and confirmed, to order any sheriff, &c. who hath any such bankrupt in custody, to discharge such bankrupt out of custody, without payment of any fee or reward; and such sheriff, &c. is required to discharge such bankrupt out of custody and is indemnified from any action for an escape 5 Geo. 2. c. 30. s. 13.

How to discharge a bankrupt.

If the bankrupt is in custody before his certificate is signed and afterwards allowed, apply to a judge, at his chambers, for a summons to shew cause *why he should not be discharged, he having obtained his certificate*; which upon producing, and an affidavit of the debt having accrued before he became a bankrupt, and the same was obtained without fraud, the judge will grant an order upon the third summons. *Vide Ashdowne v. Fisher, Barnard 386.*

If verdict be obtained for a debt previous to the bankruptcy, and costs are taxed after, yet bankrupt, if he obtains certificate, shall be discharged.

The debt arose *before* defendant became a bankrupt; but verdict was obtained and costs taxed *after* the commission, though *before* certificate allowed. The bankrupt was taken in execution; motion to discharge him. The court said, the certificate extended to the costs as well as the debt. *Rule absolute.* And though he had insured in the lottery, court were also of opinion, that was not gaming within the statute, so as to deprive him of the certificate.

certificate. *Lewis v. Piercy.* 1 *H. Black. Rep.* 29.

Cowp. 138. 1 *Wilsf.* 41.

If defendant has obtained his certificate by fraud, the court will not discharge him. *Vincent v.*

Brady. 2 *H. Black. Rep.* 1.

The court will not discharge a bankrupt on a common appearance, when the commission appears to have been grossly fraudulent, viz. the defendant lived in *Russel Street, Bloomsbury*, and the commission described him as of the parish of *Saint Faith the Virgin, in London.* 2 *Black. Rep.* 725. *Sowley v. Jones.*

If commission appears fraudulent, court will not discharge.

The bail, if the bankrupt has his certificate allowed, may apply to be exonerated by summons, without rendering the principal, before return of second *sci. fa.* *Barnes* 104. *Ray v. Hussy.*

Bail.

But if the bankrupt be in custody at the suit of the king, on an *extent*, he cannot be discharged therefrom. 1 *Atk.* 220.

Cannot be discharged from an extent.

Original action was brought in 1765, the bankrupt defendant's certificate signed in 1766. The *sci. fa.* was returnable in *Hilary* term 1768; the plaintiff 25th *June* 1767, proved his debt under the commission merely in order to dissent from the certificate, but never received any part of his debt. Judgment on *sci. fa.* against the bail, signed 4th *June* 1768, *Trin. T.* In the next vacation bail brought error, which was nonprossed in *May* 1769. Motion to set aside the execution against the bail, and why the bail should not be discharged out of custody. Court held, that the allowance of the certificate had no relation back; and till the certificate was allowed, it was nothing. That the plaintiff's proving his debt, with intent to obstruct the certificate, did not preclude him from pursuing his legal remedies; and even had he received his debt or part of it under the commission, still he might proceed to fix the bail, who would be intitled to their remedy so far as they were oppressed by *audita querela* or motion. Rule discharged. *Walker v. Gibbet and another.* 2 *Black. Rep.* 811.

Allowance of a bankrupt's certificate no relation back, to discharge the defendant's bail if fixed before such allowance.

A. becomes

Debt and costs paid for a bankrupt on a promise of indemnity is not covered by the commission, same not being paid till after the bankruptcy.

A. becomes bail for *B.* on a promise of indemnity. The bail bond is assigned, and judgment had in an action thereon, against *A.* who brings error in the Exchequer. *B.* becomes a bankrupt. Judgment against *A.* in the Exchequer, who brings error in parliament, which is nonprossed, and then he pays debt and costs. The damnification does not accrue till that payment, and is not covered by the commission and certificate; but an action lies for *A.* against *B.* the bankrupt, on his promise of indemnity. 2 Black. Rep. 794. *Goddard v. Vanderheyden.*

Bankrupt going beyond sea, refusing to assist his creditors to get in his debts, not intitled to be discharged under the Insolvent Act.

An uncertificated bankrupt going beyond sea, and refusing to assist his assignees in getting in his debts, is guilty of *nonconformity*, and cannot be discharged under the *insolvent debtors act*. *Ibid.* 1188: *Norris v. Levy.* It is his duty to attend the commissioners at all times, till his affairs are finished, or at least to be amenable to their call. It is also his duty to assist his assignees in discovering and getting in his effects. A bankrupt who quits the kingdom before the settlement of his affairs, puts it out of his own power to conform to the bankrupt laws. *De Grey, C. J. Ibid.*

Creditor is intitled to prove his costs after verdict under commission, though judgment not signed till after the commission issued.

A creditor who obtains a verdict before the commission issued, is entitled to prove his costs as well as his debt, though judgment be not signed till after the commission issued. And having proved his debt, and otherwise acted under the commission, has made his election, and shall not on a subsequent unforeseen event, at the distance of a twelvemonth, desert the commission and come upon the bail by surprise. *Ibid.* 1317. *Aylett v. Harford.*

Defendant producing his certificate, discharged on a common appearance, the bond being forfeited before commission issued.

Debt was brought on bond payable by instalments, some of which were not payable till after the bankruptcy. Question, Whether this be a debt discharged by the certificate, or not? After the first default of payment, the bond is forfeited, and the penalty is the debt in law. The court will not enter nicely into the matter of bail or no bail.

Rule

Rule for common appearance. *Barnes* 101. *Knight v. Remy*.

No debt can be barred but what was a debt contracted with certainty before the act of bankruptcy. 3 *Wils.* 13. *Chilton v. Whiffin*.

Debt when not barred.

An annuity bond, if forfeited before the bankruptcy, should be valued and proved under the commission. If not forfeited till after, it cannot be proved; and the obligor may be taken in execution on a judgment thereon. Bond given 18th January 1770; 18th March 1773, commission issued; 15th July 1773, the certificate was allowed; a quarter became due the 18th of April 1773; the annuity was regularly paid to the 18th of January 1773; so that the bond, in fact, was never forfeited. 2 *Black. Rep.* 1106. *Perkins v. Kempland*.

Annuity bond, if forfeited before bankruptcy.

A bill of exchange drawn on and accepted by A. but not due, nor paid, till after the drawer was declared a bankrupt, the defendant not discharged by the commission of bankruptcy. *Ibid.* 839. *Young et al. v. Hockley*.

When he is not discharged on bill of exchange.

Several applications were made to a bankrupt after his bankruptcy: he said the plaintiff should be no loser, but that he would pay when he was able. An action was brought, plea non assumpsit; and bankruptcy, verdict for plaintiff. Court held, that it was a conditional promise, and that plaintiff ought to have shewn defendant was able to pay. Rule absolute. *Besford v. Saunders*. 2 *H. Black. Rep.* 116. *Cowp. Rep.* 154.

When I'able upon new promise.

Proceedings against Prisoners

Caveat in these proceedings.

IF any person is in custody of the warden, or keeper of any other prison, it will behove the practitioner to take care and observe the rules laid down in the strictest manner, in proceeding against him; otherwise the least lach in the world will deprive his client of the custody of the prisoner, as the law pays the highest regard to the liberty of the subject, and most likely may be of disagreeable consequence to himself, since the courts have determined, that an attorney is liable to make satisfaction to his client for neglecting to charge a prisoner in execution, though it appeared rather for want of judgment, than negligence. 2 Wils. 325.

How prisoners were proceeded against formerly.

Formerly when any defendant was detained in custody by mesne process of this court, if the plaintiff did within two terms after the arrest cause the defendant to be brought up by *habeas corpus*, and committed, so that he might declare against him in custody of the warden, &c. the defendant might be discharged out of custody upon entering a common appearance; but now by Stat. 4 & 5 W. & M. c. 21. s. 2. *If any defendant be taken or charged in custody, at the suit of any person, upon any writ issued out of any of the courts at Westminster, and imprisoned for want of sureties for appearance, the plaintiff in such writ may, before the end of the next term after such writ shall be returnable, declare against such prisoner in the court where such writ shall issue, whereupon the prisoner shall be taken and imprisoned and charged in custody, and may cause a true copy to be delivered to such prisoner, or to the gaoler or keeper whose custody such prisoner shall be or remain; which declaration the said prisoner shall appear and plead; and if such prisoner shall not appear and plead the plaintiff in such case shall have judgment, in such manner as if the prisoner had appeared in the said court.*

The present mode for delivering declarations against prisoners.

court, and refused to answer or plead to such declaration.

That it shall and may be lawful for any person who shall have cause of action against any prisoner of the *Fleet*, after filing or entering a declaration, to deliver a copy to such defendant in any personal action, or to the turnkey or porter of the *Fleet* prison; and after a rule given to plead, to be out in eight days at most after delivery of such copy of the declaration, and affidavit made of such delivery, to sign judgment against such defendant, as if he had been charged at the bar of the Common Pleas. 8 & 9 W. 3. c. 26. s. 13.

Upon which statute the following rules were made:

That no copy of any declaration be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged in custody. *Eas. 5 W. & M.*

That no rule be given for the defendant in custody, to appear and plead to any declaration against him, until an affidavit be filed with the proper secondary, of the delivery of the copy of such declaration, and of the time when, and the person to whom the same copy was delivered, and a copy of the said affidavit shall be produced * to the prothonotary before judgment signed, together with a certificate from the proper officer, that no appearance is entered with him.

If declaration be not entered or left in the office, before the end of the next term after the writ or process (by which the prisoner shall be taken or charged in custody) be returnable, and affidavit made and filed in manner aforesaid, before the end of twenty days next after such term (Easter term excepted), and within ten days after Easter term, the prisoner shall be discharged upon the entering of his appearance, with the proper officer, by writ of *supersedeas* made by him according to the ancient practice of this court.

Motion to set aside proceedings, because the affidavit of the delivery of the declaration was not

Copy of declaration delivered to prisoners, &c. and affidavit made thereof, plaintiff to sign judgment.

No declaration to be delivered before return of writ.

No rule to appear, &c. till after affidavit filed.

* Now dispensed with.

If declaration be not entered in the office, and affidavit made, &c.

The affidavit not being filed, is no ground to set

aside proceedings:

filed within the time prescribed: *Cur.* The defendant may be supersedeable, but it is no ground to set aside the proceedings for irregularity. *Pagar v. Hadgeley. Trin. 32 Geo. 3.*

Gaoler not delivering declaration.

If any gaoler or keeper of a prison having received a copy of a declaration against any prisoner in his custody, shall suppress the same, and not deliver it forthwith to such prisoner, an attachment shall be issued against him. *E. 5 W. & M.*

Defendant surrendering in discharge of his bail before declaration delivered, to be declared against within two terms.

If any defendant hath or shall render him or herself, or be rendered to the *Fleet* prison in discharge of his or her bail, at the suit of any plaintiff, where no further proceedings by declaration have been had against such defendant so rendered, before such render, unless the plaintiff shall declare against such defendant within two terms after such render; such defendant may be discharged out of custody, by *supersedeas*, to be allowed by one of the justices of this court, if cause be not shewn to the contrary by the plaintiff or his attorney, upon notice to either of them given by the defendant's attorney or agent, and affidavit made of such notice. *R. E. 8 Geo. 1.*

The term in which the writ is returnable, to be accounted one of the two terms.

After render, to be delivered to turnkey or himself.

The defendant had put in special bail by attorney, and afterwards surrendered in discharge of his bail, declaration delivered to his attorney in time, but not to himself or the turnkey.—Court ordered a *supersedeas*. *Clavey v. Watts. 2 Black. Rep. 786.*

Fugitive.

A fugitive surrendering himself to the *Fleet* under the insolvent act, cannot be charged with a declaration; for he is not a prisoner upon any process, but a mere volunteer. *Smith v. Eyles. 2 Black. Rep. 970.*

If defendant is served with process, or arrested when at large, and becomes a prisoner in the *Fleet* before declaration, the declaration must be delivered to the turnkey. *Barnes 392.*

How

How to declare if Defendant is already in the Custody of the Warden, ats. of Plaintiff.

Make two copies of the declaration on treble penny stamped paper, take same to the prothonotaries office, pay for the entry 2s. a count, the clerk will mark both copies; then deliver one of them to the turnkey, and at the same time ask him if the defendant is his prisoner at the plaintiff's suit; if he acknowledges same, make an affidavit of the service, and swear it before a judge, annexing the other copy of the declaration thereto.

How to declare, &c.

You need not alledge the defendant to be in custody of the warden; the stat. 4 & 5 W. & M. c. 21. s. 3. does not relate to this court.

When the prisoner is in the Fleet, the declaration must be entered with the prothonotaries before it be delivered to the defendant. *Cooke's Rep.*

In Fleet must be entered before delivered.

114. London, to wit, Richard Fenn, late of London, merchant, was attached to answer John Denn in a plea of trespass on the case, and whereupon the said John Denn, by S. U. his attorney, complains, For that whereas (as in other cases).

The form of the declaration, if by original.

When the affidavit is sworn, take it to the secondaries office, and the secondary will (if in time) give a rule thereon for the defendant to appear and plead; pay 3s. 10d.

How to proceed,

If he appears by an attorney, he must pay for the issue book; otherwise if he appears in person. 2 Wilf. 11. *Everall v. Mason.*

In the Common Pleas. { John Denn, Plaintiff,
and
Richard Fenn, Defendant.

A. B. of, &c. Gentleman, maketh oath and faith, That he did, on the day of last past, deliver unto G. B. one of the turnkeys of the Fleet prison, at the lodge of the said prison, a true copy of the declaration hereunto annexed; and the said turnkey then acknowledged to this deponent,

The affidavit

ponent, that the said defendant was at that time a prisoner in the said prison of the *Fleet*, at the suit of the said plaintiff.

If no plea.

If the defendant does not plead (*no demand is necessary*) within the time, sign judgment, and give notice of inquiry to the *prisoner or turnkey*, and proceed against him as in other cases (*excepting that he must be proceeded against to final judgment within three terms*). See after the rule. *E. 8 Geo. 1.*

Demand of plea in K. B.

A demand of plea is necessary in custody of the marshal in K. B. *1 Term Rep. 591.*

Rule to plead may be given after the first rule.

But if you forget to sign your judgment on the first rule given to plead, you may in the next term give a fresh rule (*no demand is necessary*), and for want thereof sign judgment, when the rule expires.

While a treaty subsists the plaintiff not obliged to declare within the two terms.

Arrest, *October 1772*, by *capias*, returnable *ex anim.*; defendant that day committed to the *Fleet*. On the 7th *June* following, plaintiffs declared. Motion for *superfedeas*. Cause shewn was, a treaty for an accommodation between plaintiffs and defendant, which commenced on 25th *January*, and continued and not ended until about the middle of *Easter* term last, to pay 15*l.* down, and give a warrant of attorney for the residue, to which plaintiffs agreed, defendant executed same, and not being able to pay the 15*l.* plaintiffs delivered the bond and warrant up, and then delivered his declaration the 7th *June*. *Per curiam*: It is for the benefit of prisoners that plaintiffs will listen to proposals of accommodation; but no plaintiff would listen to such proposals, if prisoners should thereby become *superfedeable*; the defendant hath been the occasion of the delay, and therefore discharge the rule. *Walter v. Stewart. 3 Wils. 455.*

Charge in Execution in the Fleet.

Must be charged in execution within two terms.

After final judgment signed, the prisoner must be charged in execution, within two terms next after such judgment had and obtained, "the term in which judgment

"judgment is signed to be accounted one of the two terms." R. E. 8 Geo. 1. Except defendant brings a writ of error, 2 Wils. 380.

Make out a writ of *habeas corpus ad satisfaciendum* upon a 5s. stamped parchment, pay signing by the prothonotaries 1s. 4d. seal 7d. judge's *allocatur* 4s. (which must be obtained before it is sealed); take it to the clerk of the papers at the Fleet, four days before return, pay 9s. 2d.; it must be made returnable on a day certain, and all the proceedings must be entered on the roll with final judgment; if not carried in, get Mr. Sherwood to take it to Westminster; if filed, go to the clerk of the treasury, Mr. Stubbs, pay 2s. and desire it may be brought to the secondary; which being done, pay the warden's man 10s. 6d. for bringing up defendant, crier 1s. secondary 10s. viz. 4s. to prothonotaries, and 6s. for himself.

How to charge a prisoner in execution in the Fleet, vide title *hab. corpus*.

If he is returned with more causes than one, pay secondary 3s. each cause, 2s. to prothonotary, and 1s. for himself.

Fees on return.

A *habeas corpus ad satisfaciendum* may issue to the warden of the Fleet, or the keeper of any inferior prison of a liberty or franchise, returnable in court at a day certain, and the number roll of the judgment to be indorsed upon the writ by the attorney who sues it out; and such writ shall be a good cause of detainer. R. Mich. 1654.

Hab. corp. to issue, and number roll indorsed thereon.

If a defendant be brought into court upon a *habeas corpus ad satisfaciendum* he is to be charged in execution upon that judgment only on which the *hab. corp.* issued; and if there be several judgments on which he is to be charged, there must be a *hab. corp. ad satisfac.* in each cause. Barnes 223. *Pettit v. Molloy*.

On several judgments, separate *hab. corp.*

How to charge a Prisoner in the Fleet by Way of new Detainer.

It is ordered, That no copy of a declaration delivered at the Fleet prison against any prisoner there, shall

To detain a person in the Fleet, and hold him to

Y y 3

bail, affidavit must be made that the debt is £01. or above, and the same indorsed by the prothonotary on the copy of the declaration.

N. B. This affidavit must be sworn before a judge if made in town,

shall be a sufficient charge to hold such prisoner to bail, or to retain such prisoner in custody for want of bail, *unless an affidavit that the plaintiff's cause of action amounts to ten pounds or upwards, be first made and filed in the proper prothonotaries office, and an indorsement made by the said prothonotary, or his deputy, upon such copy of the declaration, signifying the sum of money specified; for which sum so indorsed, bail shall be required, and for no more.* R. Hil. 8 Geo. 2.

The declaration prothonotaries mark, must be delivered, and not the copy. *Newball v. James. Pract. Reg. 331.*

Two copies of declaration are prepared as before, and an affidavit must be made of the delivery of such copy, and filed *within twenty days* as before, and proceed in the same manner as before stated.

How if he is in Custody on Process issued out of the King's Bench, and removes himself to the Fleet.

The plaintiff, at whose suit the prisoner was arrested, need not make such affidavit.

N. B. But two copies are to be made as before, and affidavit of the delivery filed.

If the defendant is arrested by process issuing out of the court of *King's Bench*, and in custody for want of bail, removes himself by *habeas corpus* to the *Fleet* prison, and the plaintiff charges him in the *Fleet* with a copy of the declaration, he is not obliged to make and annex an affidavit of the debt as by rule, *E. 8 Geo. 2.* is directed, in regard there was an affidavit of the debt when the plaintiff took out the process upon which the defendant was arrested; but if the declaration comes in *as a new charge* against a prisoner in custody at the suit of another plaintiff, there the above rule must be observed. *Sampson v. Warren. Pract. Reg. 330.*

If a defendant in custody on a *King's Bench* process be committed by this court, or a judge of this court, to the prison of the *Fleet*, before a declaration delivered, the plaintiff cannot declare against him in the *King's Bench*, without removing him to the prison of that court by *habeas corpus ad respondendum*; but he may declare against him in this court, in the same manner as if he was upon process

If defendant in custody on a K. B. process, be committed to the Fleet before a declaration, how to proceed.

cess out of this court, and proceed to final judgment; and for default of declaring, &c. in due time, this court may discharge the defendant out of custody. *Maddock v. Fletcher. Barnes* 384.

But where a defendant is removed to the Fleet after the declaration delivered, the action must proceed in that court wherein the plaintiff declares, and the defendant is to be superseded by that court for want of subsequent prosecution, though detained in the prison of the other court. *Ibid.*

The prothonotaries mark the declarations, and an affidavit must be made as before.

Where a defendant was served with a copy of process, but before a declaration delivered, became a prisoner in the Fleet, and the plaintiff entered an appearance for him pursuant to the statute, and left a declaration in the office, and gave him notice of it, the court set aside the proceedings, and held, that the declaration ought to have been delivered at the Fleet. *Pryme and others v. Moore. Barnes* 392.

A prisoner in custody on an attachment for a contempt of the court, cannot be charged with a declaration without leave of the court. But the court gave leave to deliver a declaration *de novo* against the defendant. *Allgood v. Howard. Cooke's Rep.* 27. And the charging a defendant with a *ca. sa.* whilst in custody of the sheriff of *Middlesex* on an attachment for a contempt of this court, is irregular; therefore a judge's order is necessary.

It was also held, that a person in prison for felony, cannot be charged with a declaration without leave of a judge, the attorney-general, or proper court. *Ibid.*

But if he accepts the declaration, and suffers the plaintiff to take judgment, he waives all advantage of the irregularity, and shall be bound by it. *Pep- per v. Bowden. Ibid.* 31.

If prisoner be taken upon an escape warrant, and is in custody of the warden or other gaoler, he must be declared against, before the end of the second term after

How after declaration.

How to proceed when defendant has been served with a copy, and afterwards renders to the Fleet.

A prisoner on an attachment, cannot without a judge's order be declared against.

If for felony.

If taken on an escape warrant, to be declared against in two terms.

after his being so taken, otherwise he may be discharged; and the time of defendant's recaption, or coming again into prison, shall be looked upon as the time of the render. *Barnes* 382. *Mabson v. Butter*.

If two be in the writ, and one arrested.

Two defendants, one arrested and in the Fleet, process of outlawry against the other, court will give plaintiff a reasonable time to declare, that he may outlaw the absconding defendant. *Williams v. Mainwaring*. *Barnes* 401.

How to proceed if the Defendant be in Custody in Newgate, Ludgate, or any other County Gaol, at the Suit of some Plaintiff.

If in Newgate, Ludgate, or any other county gaol.

If the defendant be in custody of any sheriff, &c. then make two copies of the declaration on treble penny stamped paper, one to deliver to the gaoler, turnkey, or prisoner, and annex the other to an affidavit of such delivery, which must be filed before the end of twenty days after the second term with one of the secondaries (except after Easter term, and then in ten days), for no rule to plead can be given till affidavit is made and filed; take declaration to the prothonotaries office (pay for the entry 2s. a count), who will mark them: then leave one with the gaoler or turnkey of the prison, at the same time asking him, if the defendant be a prisoner at the suit of the plaintiff.

Need not alledge defendant to be in custody.

In this court you need not alledge the defendant to be in custody of the sheriff, or in whose custody. The *stat. 4 & 5 W. & M. sect. 3.* does not relate to this court, but to the King's Bench; and even there, where the proceeding is by original, the old form is adhered to. And neither court will grant a rule for time to declare, *Pract. Reg.* 327, unless where others are joined, and they cannot be arrested. *Barn.* 401.

No rule to declare unless, &c.

Affidavit of delivery.

R. G. of, &c. maketh oath, That he did, on the day of instant, deliver a true copy of the declaration hereunto annexed unto Mr. W, the

the gaoler (or Mr. J. B. the turnkey) of the gaol or prison of the county of O. And the said gaoler (or turnkey) then owned the said defendant above-named to be a prisoner in the said prison, at the suit of the said plaintiff; and this deponent further saith, That the said defendant was arrested at the suit of the plaintiff, by process issued out of this court, returnable before the delivery of the said declaration.

N. B. The latter part of this affidavit by the rule of E. 5 W. & M. does not seem to be necessary.

Upon filing the affidavit and declaration annexed with the *secondary*, he gives a rule to appear and plead; and if no appearance and plea, the prothonotaries clerk will sign judgment (having filed warrants of attorney), without making any copy of the affidavit of the delivery, or producing a certificate of appearance not entered, that now being dispensed with. And N. B. No demand of plea is necessary against a prisoner in this court. Nor in *K. B.* Term Rep. 591. in this case.

It has been held, That a declaration against a prisoner in a county gaol, need not be entered with the prothonotaries before the delivery, but before it is filed with the *secondary* it must; which means any time before rule to plead given. *Strickland v. Hodgson. Croke's Rep. 114. Barnes 372. S. C.*

A prisoner may any time pending the action, and before final judgment signed, put in and justify his bail, then apply for a judge's order to be discharged.

If he pleads, the issue is made up as in common cases, and if he has pleaded in person, it is to be delivered to the turnkey, or himself; he is not liable to pay for the issue, if he pleads in person, but if by attorney, it is otherwise, and the issue must be delivered to the attorney. *Everall v. Mason. 1 Wils. 11.*

If a verdict be for the plaintiff, tax the costs, and sue out a *ca. sa.* as in other cases, directed to the sheriff in whose custody he is, if the venue be laid

On filing affidavit, how to proceed.

Need not enter the declaration before rule given.

May put in bail.

Issue.

How to charge in execution in a county gaol.

laid in that county; if not, a *ca. sa.* into the county where the venue is laid, and a *testatum ca. sa.* into the county where he is a prisoner; get the *ca. sa.* returned *non est inventus*. Send the execution to the under sheriff, with directions to charge him in custody. As this is material, you had better apply to his agent in town for this purpose, there being sent to pay the sheriff.

How to detain Defendant with a new Action.

This will be by making an affidavit of the debt and suing out a *capias* into the county where the defendant is a prisoner: send the *capias* to the under sheriff, with instructions to make out his warrant thereon to the gaoler to detain him; then proceed to judgment and execution as before stated, if he is within all the rules with respect to his discharge.

Within what Time Prisoners are to appear and plead.

Declaration delivered before *menssem Paschæ*, or *crastinum animarum*, and defendant does not appear, judgment, &c.

If a copy of the declaration be delivered before *menssem Paschæ*, or *crastinum animarum*, and affidavit thereof made and filed; and the defendant does not enter his appearance with the proper officer within ten days after *Easter* or *Michaelmas Term* respectively, judgment may be entered against him if rules have been given; but if he doth enter his appearance as aforesaid, before the end of ten days after the term, he shall implead unto the next term unless the action be in *London* or *Middlesex*, and the defendant be in prison within forty miles of the city of *London* and *Westminster*; then, though he doth appear before the expiration of ten days after the end of the term, he shall plead two days before the *essoign day* of the next term; in default thereof, rules having been given, judgment may be entered against him as aforesaid. Rule E. 5 *11* & *M.*

Declaration delivered on or after *menssem*

If a copy of the declaration be delivered on or after *menssem Paschæ* in *Easter* term, or *crastinum animarum*

Prisoners. *Prisoners.* in Michaelmas term, or in Hilary or Trinity terms, and the plaintiff shall thereupon give rules to appear and plead, if the defendant enter his appearance two days preceding the effoign day of the next term, he shall imparle until the said next term; but if he doth not appear within that time, judgment may be entered against him as aforesaid.

Pascha, &c.
when to appear
and plead.

If the writ be returnable in one term, and a copy of the declaration be delivered before the effoign day of the next term, the plaintiff in such next term may give rules to appear and plead; and if the defendant doth not enter his appearance, and plead by the time that the rules are out, judgment may be entered against him as aforesaid. *Ibid.*

Writ returnable
one term, de-
claration deli-
vered before ef-
foign of next,
may give rules to
appear and plead;
if no plea, sign
judgment.

A declaration delivered the last day but one in Easter term. Rule out two days before the effoign day of Trinity. *Bond v. Pope. Barnes 224.*

The plaintiff must proceed to final judgment within three terms after declaration delivered, or after order, if declaration was delivered before, inclusive; and to execution within two terms after judgment, including the term in which judgment shall be signed, or the defendant may be discharged. *R. E. 8 Geo. 1. Vide rule at length after, 702.*

Plaintiff must
proceed to judg-
ment within
three terms after
declaration deli-
vered.

When Prisoners are intitled to their Discharge for want of Declaration.

If the defendant be committed to prison by process out of this court, or *habeas corpus*, the prisoner entering his appearance with the prothonotary in case of a plaint, or in case of an attachment of privilege; or with the *filacer*, in case of other process, and giving rules to declare, the plaintiff not declaring before the end of the next term after the commitment, the defendant in reference thereunto may be discharged of his imprisonment by *superfedeas*, at the end of the next term, and liberty for the plaintiff to declare upon that appearance the next term.

Where upon a
commitment of
a prisoner, he
may be dis-
charged by *super-
fedeas*, &c.

term after that, at the farthest. *R. M.* 1658
f. 15.

Declaration to be entered before the end of the second term, or else a *superfedeas*.

If the declaration be not entered or left in the office before the end of the next term, after the writ or process (by which the prisoner shall be taken or charged in custody) be returnable, and an affidavit made and filed with the proper secondary, of the delivery of the copy of such declaration, and of the time when, and the person to whom, the same copy was delivered, before the end of twenty days after such term (Easter term excepted, and within ten days after Easter term), the prisoner shall be discharged upon his entering of his appearance with the proper officer by writ of *superfedeas* made by him, according to the ancient practice of this court. *R. E.* 5 *M. & M. f. 6.*

N. B. The term in which the writ is returnable, is accounted as one of the terms.

A defendant is not *superfedeable* for want of declaration, till the end of the term after that in which the process is returnable (not that in which he is arrested).

Capias was taken out the 19th of May 1778, Easter term, returnable on the morrow of the Holy Trinity, and the defendant was arrested the 28th of May, five days before the end of Easter term; the plaintiff did not declare in Trinity term, upon which a *superfedeas* was moved for in the treasury chamber; the judges were of opinion, that the defendant was not *superfedeable* till the end of the term after that in which the process is returnable (not after that in which the arrest is made). 2 *Black. Rep.* 1242.

If declaration be delivered against a prisoner as such, after he has obtained a *superfedeas*, it is irregular, but no advantage can be taken, unless he apply in due time.

After a *superfedeas* obtained for want of declaration, the same plaintiff delivered a declaration against defendant as a prisoner, and on judgment by default, proceeded to execute inquiry. Rule why *superfedeas* should not be set aside.—It appeared he was superseded 12th April, had notice of the interlocutory judgment early in May, and did not make application before the middle of the month. Court held, he could not take advantage of the irregularity, unless he applied in due time, and here he had made an unnecessary delay. *R. E. disch. Gehagan v. Harper.* 1 *H. Black. Rep.* 251. 2 *Burr.* 1048. 1 *Term Rep. K. B.* 591.

The old rule of once superseable, always so, is construed thus: If the nature of the charge continue the same, he is superseable; but if that be altered, it is otherwise. Therefore if a prisoner be in custody, and he be declared against, and for want of going to trial and judgment in due time, he becomes superseable, if he do not take that advantage in due time, he may be charged in execution. *Vide 1 Term Rep. K. B. 591.* to this effect.

Explanation of the rule of being once superseable, always so.

How to discharge Defendant.

Get the clerk of the papers to give you a copy of causes, pay 3s. 6d.; take out a summons from a judge to shew cause, "*why he should not be superseated upon entering a common appearance for want of declaring.*" Serve a copy thereof on the plaintiff's attorney: if he does not attend, take out a second and third; then make affidavit of such service on a treble 6d. stamp paper, and swear the same before a judge; at the same time prepare and ingross your *superseas* for the judge's fiat; then, upon receipt of the judge's order, enter an appearance with the prothonotaries, pay 3s. 10d.; no practice requisite; signing *superseas* with prothonotaries, 1s. 4d.; seal 7d.; leave it with the warden of the Fleet.

How to discharge out of the Fleet for want of declaring.

By rule E. 23 Geo. 3. Attendance upon a summons now is but one half hour, formerly an hour; but it must be an exact attendance, as the affidavit states that you attended at six till half past six. *Contra K. B.* one hour.

If the defendant be in a county gaol, get a certificate from the gaoler of the causes, and an affidavit of having seen him sign the same; then proceed by summons as before. The first order if not consented to will be *nisi* within six days, and afterwards an absolute one, pay summons 2s.; order *nisi*, 2s.; order absolute, 6s.; then issue a writ of *superseas*, which the filacer signs, pay him 2s. 6d. seal 7d.; he files the judge's order, and then leave

How to superseate in the custody of the Sheriff for want of declaration.

the same with the sheriff in whose custody defendant is, who grants his warrant of discharge.

When intitled for want of proceeding to Judgment and Execution.

Prisoner to be discharged if the plaintiff proceed not to judgment in three terms after declaration delivered :

and having obtained such judgment, to charge the defendant in execution in two terms unless cause,

It is ordered, That if any plaintiff shall declare against any defendant in custody of the warden of the Fleet prison, or of any sheriff or other officer by virtue of any process of this court; and shall not further proceed to judgment *within three terms after such declaration delivered, inclusive of the term in which the declaration shall be delivered*, the defendant having appeared : or if any plaintiff having obtained judgment in this court, in any action against any defendant, a prisoner as aforesaid, and shall not charge such defendant so remaining a prisoner in execution upon the judgment so obtained, *within two terms next after such judgment, so had and obtained, including the term in which the said judgment shall be signed* ; or within two terms now next ensuing upon judgment already had ; then such defendant so remaining in prison, may be discharged out of custody where he shall be detained, by *suo per se* deas, to be allowed by one of the justices of this court, if cause shall not be shewn by the plaintiff or his attorney, why such plaintiff had not proceeded before that time to judgment and execution, as aforesaid, upon notice to either of them. R. B. 8 Geo. 1.

If plaintiff does not declare, where defendant renders himself in discharge of his bail in two terms ;

or not proceed to judgment in three terms,

And if any defendant hath, or shall, render him or herself, or be rendered to the Fleet prison, in discharge of his bail, at the suit of any plaintiff, where no further proceedings by declaration have been had against such defendant so rendered, before such render, unless the plaintiff shall declare against such defendant *within two terms after such render* ; and where any declaration hath been delivered against such prisoner so rendering him or herself, or being rendered, or judgment has been had against him or her before such render, unless the plaintiff shall

shall proceed to judgment upon such declaration delivered *within three terms after such render (the defendant having appeared)*, and charge such defendant in execution *within two terms after such judgment obtained*, such defendant may be discharged out of custody, by *superfedeas*, to be allowed by one of the justices of this court, if cause shall not be shewn to the contrary, as aforesaid, by the plaintiff, or his attorney, upon notice to them or either of them given by the defendant's attorney or agent, and oath made of such notice given. *R. E.*

and charge in execution within two terms after judgment, prisoner may be discharged on notice.

8 Geo. 1.

Per Cur. The three terms are always taken, inclusive of the term whereof declaration is, and unless plaintiff proceeds to sign final judgment *within the third term*, he is too late. *Davis v. Hall. Barnes 279.*

In case of a surrender after declaration, then within three terms after such surrender, the term wherein such surrender was made being one. So for not getting a demurrer argued within the third term. *Barnes 383. Huggins v. Bambridge.*

Surrender.

So for want of argument on demurrer.

Ordered, In all cases where a prisoner in the Fleet, or other gaol or prison, is discharged, or ordered to be discharged by *superfedeas* for want of prosecution, and such prisoner be afterwards arrested, or detained in custody by action of debt brought upon judgment obtained in the cause wherein such prisoner was so discharged, or ordered to be discharged, that a common appearance shall be accepted for the defendant in such action of debt upon judgment. *R. Hill. 8 Geo. 2.*

If prisoner discharged for want of prosecution, be afterwards arrested by action upon the judgment, a common appearance shall be accepted.

If a prisoner brings error, or files a bill for an injunction, the plaintiff is not bound to charge him in execution the second term. *Garratt v. Mantile. 2 Wils. 380.*

Delay by writ of error.

Per Cur. The plaintiff shall have the whole, viz. every day of the second term after final judgment signed, to charge a prisoner in execution.

The whole term to charge.

Rule explained.

If a writ be against husband and wife, and wife be in custody, she shall not put in bail for her husband.

If plaintiffs become bankrupt, and the assignees make due diligence to charge defendant in execution, yet if defendant prevents it by plea, he shall not be superseded.

2 Mod. 93.

Once discharged out of execution cannot be taken again.

If render in Easter term, and declaration filed

If the declaration is delivered in *Hilary* term 1793, the plaintiff must sign final judgment the last day of *Trinity* term, and charge the defendant in execution the last day of *Michaelmas* term.

If a writ be sued out against husband and wife and the wife only be arrested and detained in custody, she shall not be compelled to put in bail for her husband, but may file common bail for herself and have a *superfedeas* for her discharge; but if the husband only be arrested, he shall put in bail for his wife as well as himself. But where there is judgment and execution against both, she shall not be discharged. *Anon. 3 Wils. 124.*

Plaintiffs proceeded to final judgment in *Michaelmas* term 1767; the plaintiffs became bankrupts, between that and *Hilary* term, and the assignees sued a *scire facias* for execution upon the judgment, returnable the first of *Hilary* 1768. The defendant pleaded a plea, which was held by the court upon demurrer, in the same term, and therefore the defendant prevented himself from being charged in execution in *Hilary* term, which might have been done, if he had not pleaded. Now upon motion for a *superfedeas*, the court held, that the bankrupts could not charge the defendant in execution in *Hilary* term, because the assignees were entitled to the benefit of the judgment; therefore the rule for the *superfedeas* was discharged, the assignees having made due diligence. *2 Wils. 378. Bubb v. Mantell.*

If a defendant has once been discharged out of execution on terms which have not been complied with, the plaintiff cannot resort to the judgment again, or charge him in execution. *Vide 4 Burr. 2482.* Nor if he take fresh security, and it turn out to be bad. *1 Term Rep. K.B. 557.*

How for want of proceeding to Judgment, &c.

If he renders in *Easter* term, and declaration filed of *Hilary* preceding (although the plaintiff has

ried his cause), yet he is not bound to sign final judgment till the last day of *Trinity* term, nor to charge him in execution till the last day of *Michaelmas* term. of *Hilary*, when to sign final judgment.

To proceed to discharge the prisoner for the not proceeding to judgment, or charging in execution in due time, apply, if the defendant is in custody of the sheriff, to the gaoler, for a copy of his causes, take affidavit of his having signed the same, and wear it before a commissioner; then take out a summons before a judge to shew cause why he should not be discharged, which serve on the plaintiff's attorney, or agent; if he does not attend, you will, upon the third summons, have an order of course, on an affidavit of the service, and due attendance; but if he should attend, and it is a country cause, at a distance, the first is an order of course, within a limited time, to the agent, to write to his client, and then an order absolute, if no cause be shewn. The agents in town generally attend the summons, and consent to an order, unless cause be shewn in a week, &c.

Upon the order in either case being made, you take out a writ of *superfedeas* for his discharge; after appearance with the prothonotaries; pay 10d. signing *superfedeas* 1s. 4d. seal 7d. and give it with the warden or sheriff in whose custody he is.

J. G. of, &c. gent. maketh oath, and saith, That he did, on the first day of *July* instant, serve a true copy of the summons hereto annexed, on Mr. H. J. who acts as attorney or agent for the plaintiff in this cause, by leaving the same at the house of the said H. J. in *Fleet-street*, with his clerk or servant there; and at the same time shewed him the original summons. And this defendant further saith, That he did on the second day of *July* instant, serve Mr. H. J. with another copy of the summons hereto annexed, by leaving the same with the clerk or servant of the said J. at his house aforesaid, and shewed him the

Affidavit of service of the summons.

By a new order attendance on a summons only half an hour is requisite, but it must be exact from six to half past six.

said original summons; and this deponent did all on the 3d day of *July* instant, personally serve the said *H. J.* with a true copy of the summons here annexed, and at the same time shewed him the said original summons. And this deponent did, on the second, third, and fourth days of *July* instant, attend the said summons at the chambers of the Honourable *Mr. Justice Gould*, in *Serjeant's Inn, Chancery Lane, London*, on each of those days, from eleven of the clock in the forenoon until half hour past eleven; but that neither the plaintiff himself, nor his attorney, nor any other person or persons, on their, or either of their behalf, attended the said summons on the said several days, to the knowledge or belief of this deponent.

May get consent.

The agents save this affidavit, and the summonses, by attending the summons.—When the order is made, then make out a superedeas as follows:

Superedeas on entering a common appearance. To be ingrossed on 2 s. 6 d. stamp parchment.

George the Third, &c. To the sheriff of *London* greeting: Whereas *A. B.* is detained in our prison under your custody, by virtue of our writ of *capias* issued out of our court, before our justices at *Westminster*, returnable on, &c. to answer *C. D.* in plea of trespass, and also in a certain plea of trespass on the case, upon promises, to the damages of the said *C.* of 30*l.* whereby 20*l.* bail was directed to be taken: but because it sufficiently appears to our said justices at *Westminster*, that the said *A.* appeared, by *W. R.* his attorney, to answer the said *C.* in the plea aforesaid; We command you that if the said *C.* be detained in our prison under your custody, by virtue of the said writ, and for no other cause, that you will suffer him to go at large as you will answer the contrary at your peril. Witness Sir *James Eyre*, Knight, at *Westminster* the 19th day of *June*, in the 33d year of our reign.

Superedeas for want of plaintiff's proceeding to judgment

George the Third, &c. To the sheriff of *London* greeting: Whereas *A. B.* is detained in your custody, by virtue of our writ of *capias*, returnable before

fore our justices at *Westminster, &c. (the return)* within three
 past, to answer *C. D.* in a plea of trespass, and terms after de-
 so in a certain plea of debt upon demand, for claracion deli-
 l.: *And whereas* the said *A.* afterwards (that is vered.
 day), on the day of last, past, was
 charged with a declaration at the suit of the said *C.*
 the plea aforesaid; but because it appeareth to
 our justices at *Westminster*, that the said *A.* hath
 appeared in our court of Common Pleas, to answer
 the said *C.* in the plea aforesaid; and that the
 said *C.* hath not proceeded to judgment against the
 said *A.* within three terms after the delivery of the
 declaration, as required by the rules of our said
 court: We command you, that if the said *A.* be
 detained in our prison under your custody, for the
 cause aforesaid, and no other, you permit him to
 go at large, as you will answer the contrary at your
 peril. Witness, &c.

George the Third, &c. To the warden of our
 prison of the *Fleet*, greeting: Whereas *M. D.* on
 the day of 1793, rendered herself
 to our said prison of the *Fleet*, before the honour-
 able Mr. Justice Gould, one of our justices of our
 court of the Bench, in discharge of her bail, at the
 rate of *U. R.* and *H. C.* for 40*l.*; and because
 the said *U.* and *H.* have not proceeded to charge
 the said *M.* in execution within two terms next after
 judgment obtained, according to the rules of our said
 court of the Bench; We therefore command you,
 that if the said *M.* be detained in your custody, for
 that and no other cause, that then you suffer her to
 go at large, as you will answer the contrary at your
 peril. Witness, &c.

Superseas for
 not charging the
 defendant in
 execution within
 two terms.

George the Third, &c. to the sheriffs of *London*,
 greeting: Whereas *C. R.* is detained in our prison
 under your custody, by virtue of our writ return-
 ed before our justices at *Westminster*, on, &c.
 (the return), to answer *J. M.* in a plea of trespass,
 and also in a plea of trespass on the case, to the da-
 mage of the said *J.* of 100*l.*; and because it suffi-
 ciently appears to our said justices at *Westminster*,

Superseas on
 putting in good
 bail.

that the said *C.* hath appeared in our said court and found sufficient bail to answer the said *J.* in the plea aforesaid; therefore we command you, That if the said *C.* is detained in our said prison, under your custody, by occasion of the said action, and no other, then you permit him to go at large, and you will answer the contrary at your peril. *Writ of Habeas Corpus, &c.*

When he may be taken in execution after superseas, and when not.

If a defendant be discharged by superseas before judgment, he is subject to be taken in execution; but if he be superseded after judgment for want of being charged in execution (within two terms after judgment obtained) his person cannot be afterwards taken in execution in that action. *Wright v. Kewell. Barnes 377.*

Cannot detain in an action on judgment.

Cannot, instead of charging in execution, detain in an action on the judgment. *Child v. Probert. Barnes 390.*

The king may refuse his own prison against the subject.

Defendant was brought into court by the sheriff of *Middlesex*, from *Newgate*, by *ha. corp. ad satisfaciendum*. Plaintiff's counsel moved, that he might be charged at plaintiff's suit for 300*l.* and committed to the Fleet.—The crown opposed this, as he was only charged for 30,000*l.* by process out of the exchequer. *Per Cur.* The king and his people are not bound by the law of the land. The prerogative of the crown is incorporated with the law of the land. Defendant is not intitled to this *ha. corp.* The king has a right to sue in what court he pleases, and to imprison his debtor in what gaol for the county or liberty where he is arrested. The court have no discretionary power in such a case. Defendant remanded. *Sandys v. Spence. Barnes 388.*

Debtors in Execution.

*Law to be discharged out of Custody on the 32 Geo. 2.
c. 38. called the Lords Act.*

IF any person shall be charged in execution for a sum not exceeding 100*l.* and minded to deliver up to his creditor, who shall so charge him, his estate and effects, towards satisfaction of the debt, such prisoner before the end of the *first term which shall be next after such prisoner shall be charged in execution by his creditor*, to exhibit a petition to any court of law from whence the process issued, on which any such prisoner was or were taken and charged in execution as aforesaid, or into the court where any such prisoner shall be removed by *seas corpus*, or shall be charged in custody, and shall remain in the prison thereof, certifying the cause of his imprisonment, setting forth not only a true and true account of his real and personal estate, which he, or any in trust for him, is, was, or were indebted to, at the time of his petitioning; and of all incumbrances, if any there be, affecting any such real or personal estate of the person so petitioning, but also a true and true account of all the real and personal estate of any such prisoner, or any person in trust for him, or for his use, was or were interested in, or indebted to, at the time of his first imprisonment, whether in possession, reversion, remainder, or expectancy, to the best of his belief; and the securities, mortgages, notes, and books, relating thereto, with the names and places of abode of the witnesses. And before any such petition shall be received, every such prisoner shall give, or leave, or cause, &c. unto and to all and every the creditors at whose suit he shall be charged in execution, or his or her executor, &c. at his or their usual place of abode, or to his attorney or agent last employed in any

Debtor charged in execution for any sum not exceeding 100*l.* &c.

may exhibit a petition to the court,

certifying therein, the causes of his imprisonment, with a schedule of his real and personal estate, at the time of his first imprisonment.

Fourteen days previous notice of such intended petition to be given to the creditor or his attorney;

with a copy of the schedule.

Affidavit of the service of such notice to be delivered with the petition; and a rule to be made, &c.

Oath being made of the service of the rule, the court to examine.

Creditor disbelieving the oath, &c.

such action, in case any such creditor cannot be met with but not otherwise, fourteen days at least before any such petition shall be presented and received, a notice in writing, signed with the proper name or names of such prisoner, importing therein, That such prisoner doth, or do intend, to petition the court from whence the process issued, upon which he stands charged in execution, or into the prison to which a such prisoner shall have been removed by habeas corpus, or shall stand charged in execution on any judgment, recovered on any bill or declaration, filed or delivered in any such court: And also setting forth a true copy of the account or schedule, including the whole real and personal estate of the person or persons so designing to petition, which he doth intend to deliver other than and except the necessary wearing apparel and bedding of the prisoner, and his, her, or their family, and the tools or instruments of his trade or calling, not exceeding 10*l.* in the whole.

Affidavit of the due service of such notice to be left at the same time with the petition, and returned openly, and a rule to be made upon receiving the petition, for bringing the prisoner into court, and summoning the creditor to appear personally, or by attorney, at some certain day to be specified; and the creditor appearing or not, in person, or by attorney, then upon affidavit of the due service thereof being made on him, her, or them, or his, her, or their attorney, if any such creditor, his, her, or their executors or administrators cannot be met with, such court shall, in a summary way, examine into the matter of every such petition, and be satisfied what can, or shall be alledged on either side, for or against the discharge of any such prisoner, who shall so petition, and order an assignment of his effects. But if the creditor shew cause of disbelieving his oath, and desire further time for information, the court is to remand the prisoner back to the next further day, and the creditor not appearing, he may be discharged, unless the creditor insist upon his contention, and covenant to allow him 2*s.* 4*d.*

week. But upon failure at any time in the payment thereof, the prisoner, upon application to the court, to be discharged, &c. Where more creditors than one insist on the prisoner's detention, they are to pay him each not exceeding 1s. 6d. *Stat. 14.*

By stat. 33 Geo. 3. c. 5. Persons charged in execution for any sum or sums not exceeding three hundred pounds, shall be intitled to the relief as by the act of 32 Geo. 2. is granted.

By *sect. 2.* Every person in execution for any sum exceeding 100*l.* and not exceeding 300*l.* shall be intitled to relief, notwithstanding the time limited by said act for such person to apply, is or may be expired, provided such application be made at any time before the end of *Easter* term next.

That every creditor, his or their executor, &c. and at whose suit any debtor shall be charged in execution, for any sum not exceeding 300*l.*, shall have such remedy by compelling such debtor to deliver up his or her estate and effects for the benefit of his or her creditors, as is provided by 32 Geo. 2. *sect. 3.*

Where any debtor shall have neglected, or shall neglect to take the benefit of said act, or of this act, within the time limited by either acts, and shall make it appear that such neglect arose from *ignorance* or *mistake*, such debtor shall be intitled to take the benefit of the said act, or of this act, as if he or she had taken same within time by said acts so limited, *sect. 5.*

A prisoner in custody on an attachment for non-payment of money awarded, pursuant to rule of court on bonds, and likewise for not paying costs taxed, after demand made, and also on an *excommunicato capiendo*, or other process, for or grounded on the non-payment of costs in any cause or proceeding in any ecclesiastical court, are intitled to the benefit of this act, and subject to the same terms with respect to prisoners for debt only, *sect. 4.*

Persons charged in execution for sums not exceeding 300*l.* to be intitled to relief.

Persons now in execution for sums exceeding 100*l.* and not exceeding 300*l.*

Debtors in execution for sums not exceeding 300*l.* may be compelled to deliver up their effects.

Debtors who from ignorance have not taken benefit of 32 Geo. 2. or this act.

Attachment or *excommunicato capiendo*.

Interrogatories
may be filed.

Creditor to file interrogatories for the examination of the prisoner *before the taking the benefit of the acts*, sect. 5. Provided that this shall not extend to debts due to the crown, *sect. 6.*; nor shall it affect any proceeding had under any commission of bankrupt; nor to extend to *Scotland*; and to continue in force for five years.

In the Common Pleas.

John Denn against Richard Fenn.

John Denn,

The notice,

Take notice that I intend, after the expiration of fourteen days from the date hereof (or so soon after as I can be heard), to petition his majesty's court of Common Pleas at *Westminster*, for such relief and benefit as I am intitled to, by virtue of an act of parliament made and passed in the thirty-second year of the reign of his late majesty king *George the second*, entitled, "An act for the relief of debtors with respect to the imprisonment of their persons, &c." and also of an act made and passed in the 33d year of the reign of his present majesty, entitled, "*An act for the further relief of debtors &c.*" and that I have no debts, estates, or effects whatsoever; nor had I at the time of my first imprisonment in this action, or at any time since either in possession, reversion, remainder, or expectancy (other than and except what is contained in the schedule or inventory hereunder written), the necessary wearing apparel and bedding for myself and family, and the tools or instruments of my trade or calling, not exceeding the sum of 10*l.* in value in the whole: as witness my hand this day of

1793.

Witness G. R.

Schedule,

A schedule or inventory of all the estate and effects which I R. F. a prisoner in execution, in the custody of J. B. Esquire, sheriff of the county of Berks, at the suit of J. D. or any person or persons in trust for me, was, or were possessed of, or entitled unto, at the time

of my first imprisonment, at the suit of the said J. D.
 or at any time since, either in possession, reversion, re-
 mainder, or expectancy, other than and except the ne-
 cessary wearing apparel and bedding of or for me or my
 family, and the tools or instruments of my trade or
 calling, not exceeding 10*l.* in value in the whole; as
 witness my hand this day of 1793.

R. F.

Real estate.—I have none, either in possession, re-
 version, remainder, or otherwise.

Goods.—One old chair; six pewter plates.

Debts.—*J. W.* of Oxford, labourer, £200

Witness *J. G.*

R. F.

To the Right Honourable Sir James Eyre, Knight,
 Lord Chief Justice of his Majesty's Court of Com-
 mon Pleas at Westminster, and the rest of the Jus-
 tices of the same Court.

The humble Petition of Richard Fenn,

Sheweth,

That your petitioner is a prisoner in his majesty's Petition.
 gaol in and for the county of *Berks*, in execution at
 the suit of *John Denn*, for the sum of 60*l.* debt, and
 63*s.* damages, as by the certificate annexed more
 fully appears.

That your petitioner humbly apprehends he is
 entitled to the benefit of an act of parliament, made
 and passed in the 32d year of the reign of his late
 majesty king *George the second*, entitled, *An act for*
the relief of debtors, with respect to the imprisonment of
their persons, &c. and also of an act made and passed
 in the 33d year of the reign of his present majesty,
 entitled, *An act for the further relief of debtors, &c.*

That your petitioner hath not at the time of ex-
 hibiting this his petition, nor had he at the time of
 his first imprisonment in this action, or at any time
 since, any debts, estates, or effects whatsoever, either
 in reversion, remainder, or expectancy (other than and
 except what is mentioned and contained in the schedule
 or inventory hereto annexed), the necessary wearing
 apparel

apparel and bedding for himself and family, and the tools or instruments of his trade or calling, not exceeding the sum of ten pounds in value in the whole.

“ Your petitioner being willing and desirous
 “ to conform himself to the direction of
 “ the said several acts, most humbly prays
 “ your Lordships, to grant a rule or order
 “ of this honourable court, for the plaintiff
 “ to shew cause why he should not be dis-
 “ charged pursuant to the said acts, and as
 “ in duty bound, your petitioner will ever
 “ pray, &c. R. F.”

N. B. This petition will serve for a prisoner in custody of the warden.

**Affidavit to be
 annexed.
 Put the title of
 the cause.**

J. G. of, &c. gentleman, maketh oath and saith, That he was present, and did see *R. F.* the above-named defendant sign his name, (or mark,) to the notice and schedule hereunto annexed, on the day of the date thereof, and also to a copy of the same; and that the name *J. G.* subscribed as a witness thereto, is of the proper hand-writing of this deponent.

**Affidavit of ser-
 vice of the no-
 tice and schedule.
 Put the title of
 the cause.**

A. B. of, &c. maketh oath and saith, that he this deponent did, on the day of instant, serve the above-named plaintiff *J. D.* with a true copy of the notice (*and schedule*) hereunto annexed, by delivering the same to *E.* the wife of the said *J. D.* at his dwelling-house, or place of abode, situate in in the county of

If it is a country cause, or the defendant be in custody of any other gaoler (except the warden), then there must be an affidavit of seeing the gaoler sign the certificate, which will be as follows, (and the affidavit of service of the rule, as well as that of seeing the gaoler's certificate signed, may be included in one affidavit):

**Affidavit of
 seeing the gaoler
 sign.**

J. F. of, &c. maketh oath and saith, That he did see *A. D.* the keeper of his majesty's gaol or prison of, &c. sign the certificate hereto annexed, and that the name *A. D.* set and subscribed at the
foot

foot of the said certificate, is of the proper handwriting of the said *A. D.*

The petition and affidavit are to be ingrossed on paper *without a stamp*, and to be sworn in town before a judge (pay nothing; in the country, to be sworn before a commissioner: annex also a copy of the cause from the gaoler in the country (if in custody of the warden, the clerk of the papers certifies). After affidavit sworn, leave it at the secondaries, who will give you a rule to bring up the defendant, and for the plaintiff to appear, pay 2s. 6d.; serve a copy on the plaintiff, and also on the gaoler; make affidavit on plain paper, of such service, and at the same time of *shewing the original rule* as follows:

J. F. of, &c. gentleman, maketh oath and faith, That he this deponent, did on the _____ day of _____ last past, personally serve *John Denn* the above-named plaintiff with a true copy of the rule hereto annexed, and at the same time shewed to him the said original rule. *J. F.*

If this be to bring the prisoner to the assizes, the affidavit of the service of the rule is produced there.

The defendant being an insolvent debtor, was brought into court a second time, and plaintiff being dead, his executors appeared and prayed further time to inquire into the truth of the defendant's discovery of her effects, but the court refused to enlarge the time, which is limited by the act, and discharged the prisoner. *Luke v. Wallis. Barnes 370.*

Plaintiff's attorney appeared, and offered to sign a note for 2s. 4d. per week, to be allowed defendant in order to continue him in prison in execution at the plaintiff's suit, held not sufficient. *Ibid. 371. Warrington v. Elliott.*

All objections as to the insufficiency of a prisoner's schedule of his effects in point of form, are to be made on the first attendance: the second time

How to proceed.

Affidavit.

If at assizes.

Cannot bring a prisoner up more than twice.

Plaintiff's attorney cannot sign a note.

Objections to the schedule in point of form, to be made the first time.

time the prisoner is brought up, the plaintiff must be prepared to falsify the account given by defendant of his effects, if he can; or he will be too late to object to the schedule in point of form. *Ibid.* 372. *Jenner v. Swan.*

If plaintiff means to pay 2 s. 4 d. per week, note should be on a 6 d. stamp.

Notes

J. D. { I hereby promise to pay and allow to
v. *A. B.* 2 s. 4 d. per week, weekly, on
R. F. { Monday in every week, for so long time
as he shall continue in prison, in execution, at my
suit: as witness my hand this day of
1793.

Witness *J. G.*

R. T.

If plaintiff cannot attend,

If the plaintiff cannot attend, he may sign it, and his attorney may make affidavit of his having signed it in his presence, and his witnessing same, and if delivered at the time of his discharge, will do. But it must be delivered in court, and must be on stamp paper.

Habeas Corpus.

THERE are several writs of *habeas corpus*, to Habeas corpus; which the subject is entitled by common right, when he is deprived of his liberty. But the great and efficacious writ, in all manner of illegal confinement, is that of an *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum subjiciendum, & recipiendum*, to do, submit to, and receive, whatsoever the judge or court, awarding such writ, shall consider in that behalf. *State Trials, vol. 8. 142.*

To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and, in the end, would destroy all civil liberty, by rendering its protection impossible; but the glory of the *English law* consists in clearly defining the times, the causes, and extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment, the reason for which it is made; that the court upon an *habeas corpus* may examine into its validity; and according to the circumstance of the case may discharge, admit to bail, or remand the prisoner.

No *habeas corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 *Black. Rep.* 1324. the case of the three Spanish failors.

Great delays were made in granting this writ, because the judges who had authority to issue it, pretended to have power either to grant or deny it; not only that, but the party imprisoning, was at liberty to delay his obedience to the first writ, and might wait till a second and third, called an *alias* and *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised

Delays made originally in issuing and returning this writ.

tised to detain prisoners in custody, particularly state prisoners. *State Trials*, vol. 7. 136.

This oppression gave birth to the famous *habeas corpus* act, 31 *Car. c. 2.*; which is frequently considered as another *magna charta* of the kingdom; and by consequence has also, in subsequent times, reduced the method of proceeding on these writs (*though not within the reach of that statute, but issuing merely at the common law*) to the true standard of law and liberty. 3 *Black. Com.* 135.

Attachment for
not obeying it.

This statute has remedied every inconvenience the prisoner was subject to; for if not obeyed within a reasonable time, the officer or sheriff is subject to a large penalty, besides an attachment for his contempt of the court from whence it issued.

This court has a general jurisdiction to grant writs of *habeas corpus* in all cases whatsoever. 3 *Wils.* 172. *Wood's case.*

How to remove the Body from the Custody of the Sheriff, on a King's Bench Process, to the Fleet Prison.

If the defendant be detained on a writ out of the *King's Bench*, and wishes to go to the *Fleet* prison, he must get a creditor to issue a writ out of this court for 10 *l.* or upwards, to warrant his going by *habeas corpus*; in that case an affidavit is made of the debt before the filacer, and a *capias* sued out, and left, with the *habeas corpus*, at the sheriff's office; which being returned, the sheriff's officer takes the defendant to the chief justice's chambers, or in his absence any other judge of this court, who will commit him. *Barnes* 20.

If in an inferior
jurisdiction.

But if in custody
already.

If he is in custody in an inferior jurisdiction, as the sheriff's court of *London*, &c. then he may be removed to the said prison, in the first instance by *habeas corpus*, because that writ removes the action with the body into this court. And if in custody already upon a writ issued out of this court, an *habeas corpus* may be sued out in the first instance, and left with the sheriff for his return; whose officer brings

brings up the defendant before the judge, as before, to be committed.

The *habeas corpus* is now printed on a 5 s. stamp, How to sue out habeas corpus. and may be had at the stationers in blank; but in case it is not to be had, I shall here insert the form thereof, which is as follows:

George, &c. To the sheriffs of *London*, greeting: Habeas corpus.
We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before Sir *James Eyre*, Knight, our chief justice of the Bench, at his chambers, situate in *Serjeant's Inn, Chancery Lane*, immediately after the receipt of this our writ, to do and receive all and singular those things which our said chief justice shall then and there consider of him, in this behalf; and have there this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 6th day of *November*, in the 34th year of our reign. No præcipe is necessary.

J. K. Attorney.

This you take to a judge, if in town, for him to sign; if not, the prothonotaries sign same; pay judge's fee 4 s. and signing 1 s. 4 d. seal 7 d. Take the same to the secondaries office in *London*, *Grocer's Alley, Poultry*, where the action is, who will return the same. If in *Middlesex*, take it to the sheriff's office in *Tooke's-court, Cursitor-street*.

Though this writ is returnable before the chief justice, yet any other judge may commit the prisoner. Any judge may commit.

When the sheriff has returned the writ, an officer will take the prisoner to the judge's chambers; get a tipstaff; and he will then commit the defendant; pay the officer 10 s. 6 d. How to proceed after return got from the sheriff.

If the *habeas corpus* be in *Middlesex* or *London*, pay the sheriff 9 s. 4 d. for the first action, 2 s. 4 d. for every other, *mittalis*, 2 s. 4 d.; and if the defendant Fees for the sheriffs.

defendant is in *Newgate*, 2s. 4d. for warrant to deliver.

Palace court,

If it be from the palace court, pay 5s. for allowing, and 4d. for the *jurat*.

The above form will do for all counties, only direct it to the sheriff, in whose custody the defendant is.

Fees in the country.

If you remove a person from the country, the sheriff is paid 1s. *per mile* for bringing him to town, and the judge will not (it is said) commit the defendant, unless the sum is paid. *Cooke's Rep.* 110. *Cope's case*. But the officer must obey the writ, though the prisoner refuses to pay his fees, for he has another remedy for them. 2 *Str.* 814.

Defendant not to be discharged, till bail perfected.

If the defendant be returned in custody, on a *habeas corpus*, he is not to be discharged until he perfects his bail, or obtains a superseas from the *Fleet*.

How to remove the Cause from the Inferior Courts:

Before I proceed to shew the mode how to remove the cause, it may be proper to state the several acts of parliament relating thereto; and first the act 21 *Jac.* 1. c. 23. being an act to avoid vexatious delays by the removal of frivolous causes, which enacts, That where the judge of an inferior court is an utter barrister of three years standing at the bar, no cause shall be removed from thence by *habeas corpus* or other writ, except it be delivered before issue or demurrer joined in the said cause, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant to such action. *Sec.* 2.

No suit shall be removed, unless writ be delivered before issue or demurrer joined.

That no cause, if once remanded to the inferior court by writ of *procedendo*, or otherwise, shall ever afterwards be again removed. *Sec.* 3.

A suit once remanded, shall never afterwards be removed.

And that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of 5*l.* But an expedient having

ing been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for 5*l.* or upwards (and then by the course of the court the *habeas corpus* removed both actions together), it is therefore, by statute 12 *Geo.* 1. c. 29. *f.* 3. enacted, That the inferior court may proceed in such actions as are under the value of 5*l.* notwithstanding other actions may be brought against the said defendant to a greater amount.

And in order to prevent delays being made in trying causes in inferior courts, which were frequently practised by the 43 *El.* c. 5. it is enacted, That such writ of *habeas corpus* shall be delivered to the judge before that the jury have appeared, and one of them sworn to try the cause. *Sec.* 2.

Writ of *habeas corpus* not to be allowed after one of the jurors sworn.

By the 19 *Geo.* 3. c. 70. *f.* 6. it is enacted, That no cause, where the cause of action shall not amount to the sum of 10*l.* or upwards, shall be removed or removeable into any superior court, by any writ of *habeas corpus*, or otherwise, unless the defendant, who shall be desirous of removing such cause, shall enter into recognizance for the payment of the debt and costs, in case judgment shall pass against him; as in *sec.* 5.

No cause under 10*l.* to be removed into a superior court, unless bail be given for the debt, &c.

By *sec.* 4. it is enacted, That in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, it shall be lawful for any of his Majesty's courts of record at *Westminster*, upon affidavit made and filed therein, of such judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his, her, or their effects, and of execution having issued against the person or persons, or effects of the defendant or defendants, are not to be found within the jurisdiction of such inferior courts, which affidavit may be made before a judge or commissioner authorised to take affidavits, and such superior courts to cause the record of the said judgment to be removed into such superior court, to issue writs of execution thereupon to the sheriff of any

If judgment be obtained in the inferior court, and the defendant cannot be found, how to proceed.

county, city, liberty, or place, against the person or persons, or effects of the defendant or defendants, in the same manner as upon judgments obtained in the said courts at *Westminster*; and the sheriff, upon every such execution, shall, and he is hereby authorised to detain the defendant or defendants, until the sum of 20*s.* be paid to him, or levy the same out of the effects, according to the nature of the execution, for the extraordinary costs of the plaintiff or plaintiffs in the inferior court, subsequent to the said judgment, and of the execution in the superior court, over and above the money for which such execution shall be issued.

Upon what conditions executions shall be stayed upon any writ of error, &c. for reversing judgment given in an inferior court where the damages are under 10*l.*

That no execution shall be stayed or delayed upon or by any writ of error or *superfedeas* thereon to be sued, for the reversing of any judgment given, or to be given, in any inferior court of record, where the damages are under 10*l.* unless such person or persons, in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court (wherein such judgment is or shall be given) shall allow of, shall first before such stay made, or *superfedeas* to be awarded, be bound unto the party for whom any such judgment is or shall be given, by recognizance, to be acknowledged in the same court, in double the sum adjudged, to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of error be *nonprossed*) all and singular the debt, damages, and costs, adjudged or to be adjudged, and all costs and damages to be awarded for the same delay of execution. *Sec. 5.*

Habeas corpus to remove the cause.

George the Third, &c. To the sheriffs of *London*, greeting: We command you, that you have the body of *C. D.* detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he shall be called in the same, before Sir *James Eyre* Knight.

Knight, our chief justice of the bench, at his chambers, situate in *Serjeant's Inn, Chancery-lane*, immediately after the receipt of this writ, to do and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf; and have there then this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of *June*, in the 33d year of our reign.

To bear teste in term.

No *præcipe* necessary.

To be taken to a judge if in town to sign, if not to the prothonotaries office; pay judge's *allocatur* and signing 5s. 4d. seal 7d. take same to the office where the action is entered, and if but one cause, and above 10l. pay 4s. 10d. for the allowance, fee to the judge 2s. 4d.

If it be brought to remove a cause out of the inferior court under 10l. then bail must be put in, and two days notice *exclusive* given for their coming into the court below, and becoming bail for the defendant, in order that the plaintiff's attorney may have an opportunity of inquiring into their sufficiency; and upon their entering into a recognizance, before the judge, for the payment of the debt and costs, then the judge will order the allowance of the writ.

How to proceed before allowance made of habeas corpus, if under 10l.

Of Plaintiff's Proceedings.

The bail being allowed in the court below, the first step the plaintiff's attorney takes, is to apply to a judge for a rule, for the defendant to put in bail on the *habeas corpus* within *four days*, if in term; if in vacation, *six days*; pay for the same in term 1s. in vacation 2s. serve defendant's attorney with a copy thereof, and if he does not put in bail within the *four or six days next after service*, nor take out a summons for time to put in bail, (which he may do,) then the plaintiff is entitled to a *procedendo* on obtaining a certificate from each judge's clerk, that no bail is filed, which is to be delivered to the prothonotaries clerk, before the signing the *procedendo*; pay each certificate 4d.

How to proceed after the allowance.

Habeas Corpus.

How to put in Bail.

How to proceed
for defendant.

But if the defendant puts in his bail, then he is to apply to the sheriff, &c. for a return of the *habeas corpus*, to annex to the bail-piece, as it may appear what the causes are for which defendant is arrested: This being done, go to Mr. Sherwood, who will fill up the bail-piece, and attend one of the judges to put them in; pay judge 7 s. 6 d. in vacation, and 5 s. in term, prothonotaries fees 2 s. Mr. Sherwood 3 s. 4 d. for his attendance.

Bail-piece, to
be ingrossed on
2s. stamp parchment,

In the Common Pleas.

Michaelmas Term, in the 34th year of the reign of King George the Third.

London, } *Habeas corpus* for Richard Roe, at the suit of John Doe, in a plea of trespass on the case; damage 40 l. oath for 20 l.

The bail are, John Denn, of Cheapside, London, gentleman, and

T. G. Defendant's } Richard Fenn, of the same, gentleman, Attorney. } Each of the bail in 40 l.

Taken, &c.

N. B. If the defendant joins, then the bail are bound in the sum sworn to only, and defendant in double the sum.

Recognizance of
bail.

You John Denn and Richard Fenn are bail for Richard Roe, at the suit of John Doe, and acknowledge to owe to the said John Doe, the sum of 40 l. upon condition that the defendant do appear to a new original, to be filed in the court of Common Pleas within two terms, and if he be condemned in the action, he shall pay the condemnation money, or render his body a prisoner to the Fleet; and if he fails so to do, you the bail severally undertake to do it for him.

N. B. A memorandum or minute is to be filed on a 2 s. 6 d. stamp with the judge's or prothonotary's clerk.

If under 10 l.

If the cause returned be under 10 l. then the recognizance is taken for the debt and costs, and not to render. *Vide Stat. 19 Geo. 3. c. 70. s. 6.*

When bail is put
in. how to proceed.

When the bail is put in, notice in writing is to be given to the plaintiff's attorney, of the names and

and additions, the time when, and the judge before whom the same is put in. *R. Hil. 13 & 14 Car. 2.*

In the Common Pleas.

John Doe against *Richard Roe.*

Take notice, that special bail was this day put in upon the *habeas corpus* issued in this cause, before the Honourable Mr. Justice Gould, at his chambers, in *Serjeant's Inn, Chancery-lane, London*, and the names are *John Denn* of *Cheapside, London*, gentleman, and *Richard Fenn* of the same, gentleman. Dated, &c. Yours, &c.

Notice of bail,

To Mr. *R. T.* Attorney for the plaintiff. *A. K.* Attorney for the defendant.

If the plaintiff's attorney does not like the bail, he (*instead of entering an exception*) applies to the judge's clerk for a rule for better bail, which is returnable in *four days next after service*, a copy of which is to be served on the attorney for the defendant: if the bail do not justify within the *four days (provided there are four days in the term left)* then you may apply to the judge before whom the bail are put in, for his certificate of their not having justified, pay *4d.* take same to the prothonotaries with your writ of *procedendo* (which you will make out), and the clerk will sign it: the form of which see hereafter.

If plaintiff does not like the bail put in, how to proceed.

If there are not *four days* in term after rule served, then notice must be given to justify on the *first day of the next term*; which being done, no *procedendo* can issue.

If there are not four days in term left.

N. B. Plaintiff must take out his rule for better bail, and serve same, *within twenty days after such bail taken.* *R. H. 13 & 14 Car. 2.*

Rule for better bail within 20 days.

Take notice, that the bail already put in for the defendant in this cause, upon the writ of *habeas corpus*, and of whom you have had notice, will, on *Monday next*, justify themselves in open court, as good and sufficient bail for the said defendant. Yours, &c.

Notice of justification.

Two days notice
of justification.

This notice must be given *two days*, exclusive of the day of justification, and defendant may add to the bail already put in, but care is to be taken to pursue the new rule in that case, of *M. 20 Geo. 3. p. 182.* Make affidavit of the service thereof, and speak to Mr. *Sherwood* to get the bail-piece of the judge's clerk to take to *Westminster*; pay him his fee of *3 s. 4 d.*; give brief to a serjeant *10 s. 6 d.*; in the evening draw up rule for the allowance at the secondaries, and serve copy on plaintiff's attorney.

Rules concerning Bail on Habeas Corpus.

Bail on removal.

That in all causes of removal, be it by *habeas corpus*, *privilege*, or *certiorari*, special bail ought to be given. *R. M. 1654. sect. 12.*

Upon removal out of an inferior court, the original to agree with the nature of the action.

If from courts of towns, &c. the action must be laid in the county where the town lieth.

That in case of a removal out of an inferior court or reversal, the new original to agree in the nature of the action, the sum in demand, and the county, otherwise the bail not liable; but if the party will appear to such varying original, to be good as to the party; but if upon a cause removed by *habeas corpus* out of the courts of *Canterbury*, *Southampton*, *Hull*, *Litchfield*, or *Poole*, if the action be transitory, it must be laid in the county of *Kent*, *Southampton*, *York*, *Stafford*, or *Dorset*, where the town and county lieth, and the recognizances to be taken accordingly. *R. M. 1654. f. 12.*

Rule of Hil. 13
& 14 Car. 2.
concerning bails
on hab. corp.

That writs of *habeas corpus*, directed to the inferior courts of *London*, *Westminster*, *Southwark*, and other courts within five miles of *London*, may be returnable *immediate*. *R. M. 1654. f. 10.* And if the defendant intendeth to be bailed, then upon, or within *four days* after allowance of the writ, the day of which allowance being indorsed by such officer as allows the same, on the back of the said writ, notice is to be given in writing of the names and additions of the bail, *the time when*, and *the judge before whom the same is intended to be put in*, to the plaintiff or his attorney, or him that caused the

Notice of bail
must be given.

plaint

plaint to be entered; or if none can be found, then notice of the premises to be left in writing with the chief clerk of the inferior court, or his deputy, by the party that tenders the bail, or his attorney, and oath made thereof, otherwise the bail not to be taken, and a *procedendo* granted if desired, before bail excepted to: that if no bail in such cases be put in within *eight days* after *habeas corpus* allowed in those courts, when it is returnable *immediate*, a *procedendo* may be granted by any judge of this court if desired, before bail taken; and if bail be taken in the absence of the plaintiff, or his attorney, the same is to be taken *de bene esse*; and if no exception be taken within *twenty days* after the bail taken, notice having been given as aforesaid, then the bail-piece to be delivered out to be filed. *Ibid.*

If no bail be put in within eight days after hab. corp. allowed, a *procedendo* may be granted.

That if bail upon a *habeas corpus* be taken before a judge at his chambers, and not dissented unto, if not filed within *four days* after the *twenty days*, a *procedendo* may be granted upon certificate that it is not filed; that in term time the plaintiff in the inferior court may speed the defendant, to put in and file his bail by rules given in the bill of pleas; and if not filed according to the rules upon certificate thereof, a *procedendo* to be granted. *Ibid.*

Bail on hab. corp. to be filed within *four days* after *twenty days*.

That all writs of *habeas corpus*, returnable in court, be returnable at a day certain. *R. Hil. 13 & 14 Car. 2.*

Rules may be given to put in bail.

That upon bail taken of persons in custody, the judge's clerk to deliver the bail to the prothonotary to be filed, if assented unto: and to that end the prothonotary's fees to be deposited; but the prisoner not to be discharged until the bail be assented unto, or over-ruled in open court. *Ibid.*

Bail taken of persons in custody, the judge's clerk to deliver the bail-piece to the prothonotary.

That where a *habeas corpus* is returnable in court, the prisoner be brought at the day limited. *R. M. 1654. f. 10.*

Prisoner to be brought up on the day.

And where it is to have the body *immediate*, the sheriff is to return the writ the *same day*. *Ibid.*

If ret. immediate.

If there are more causes than one returned, bail must in that case be put in for the whole. *Salk.* 352.

Cannot nonpros.

The defendant cannot nonpros the plaintiff for want of a declaration, he not being bound to follow him.

Of the Declaration.

How to declare.

When bail is put in, the plaintiff may, if he means to follow the defendant, declare against him *de bene esse*, or if justified (*in chief*), and all the proceedings are *de novo*, for the record is not removed on a *habeas corpus*, as it is on a *certiorari*. *Salk.* 352. But such declaration is to be delivered within two terms. *Barnes* 90. *Clarke v. Harbin*. In this court it has been held, that on a *certiorari*, though parties were at issue in the court below, yet plaintiff must declare *de novo*. *Barnes* 345. *Turner v. Bean*.

The declaration is exactly in the same form as others, therefore no need to insert it here.

When to plead.

I take it, that the defendant is to plead to the declaration within the same time as others; but he is not in any case intitled to an imparlance, unless by special leave of the court, or judge, although declaration be delivered the last day of the term. *1 Will.* 154.

Defendant was arrested, and before removal of the plaint, married, and afterwards pleaded coverture.

Defendant, whilst a *feme sole*, was arrested in the palace court, and a day or two after the arrest married, and then removed the plaint by *habeas corpus* into this court, and pleaded her coverture in abatement. Rule made absolute to set aside the plea, upon hearing counsel on both sides. *Barnes* 355. *Haddock v. Howard*.

After interlocutory judgment.

Motion for a *procedendo* to *Boston Borough Court*. *Habeas corpus* to remove the cause being brought, after interlocutory judgment in the inferior court: *Cur.* thought it too late after judgment, and made the rule for *procedendo* absolute. *Wyate v. Markham*. *Barnes*

Barnes 221. The contrary is the practice, and so determined in 2 Burr. 759. Cox v. Hart. The inferior court allow it any time before jury sworn, and so there determined notwithstanding. 21 Jac. 1.

23.

If an action be brought against a *feme covert* as a sole trader, such action cannot be removed by *habeas corpus* from the city court. 2 Black. Rep. 1060. Pope against Vaux and Wife. If it is, you may move for a *procedendo*. Ibid. No cause was shewn against motion for *procedendo*.

Cannot remove against a sole trader.

Upon a *habeas corpus* to remove a cause out of an inferior court, a *procedendo* shall be awarded, if it appears that the action is maintainable there only. Garth. 75.

If the cause is only maintainable in the court below, not to be removed.

If removed from Mayor's Court, London.

Frequently plaintiffs in the mayor or sheriff's courts, London, bring debt upon the custom, in order to ground an attachment, and after removal the plaintiff cannot declare in such action in the superior court, *in debt*, because his debt may arise in simple contract; therefore, in order to enable him to declare in such action, he must move the court in term for a rule to shew cause why a *procedendo* should not issue, unless the defendant will accept a declaration in case; and if the defendant should not agree to accept such declaration, the court will grant a *procedendo*; if in vacation, it is done by a judge's summons.

If the action be in the courts of London in debt, and the cause is removed after an attachment dissolved, how to proceed, if the action cannot be maintained in the superior courts.

If the defendant does not put in or justify his bail in due time as before said, then issue the following writ of *procedendo*, after certificates obtained from each judge's clerk.

Procedendo.

George the Third, &c. To the sheriffs of London, greeting: Although we lately by our writ commanded you, that you should have the body of D. detained in our prison under your custody, as

Writ of *procedendo*.

I

it

it was said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* might be called in the same; before Sir *James Eyre*, Knight, at his chambers in *Serjeant's Inn, Chancery Lane*, immediately after the receipt of that writ, to do and receive all and singular those things which our said chief justice should then and there consider of him in that behalf; yet for certain causes in this behalf specially moving our justices of the Bench aforesaid, at *Westminster*. We command you, and every of you, that in all complaints and suits against the said *C. D.* at the suit of *A. B.* in our court, before you, or any of you, now depending undetermined, you proceed with what speed you can, in such manner, according to the law and custom of our kingdom of *England*, as you shall see proper, our said writ to you first thereupon directed to the contrary in anywise notwithstanding. Witness Sir *James Eyre*, Knight, at *Westminster*, the 6th day of *November*, in the 34th year of our reign.

To be ingrossed on a 2 s. 6 d. stamp parchment, and to be signed by the prothonotaries; pay 1 s. 4 d.; seal 7 d. allowing 6 s. 10 d. attorney's fee below, 3 s. 4 d.

If bail surrender.

Cannot surrender if debt under 10l.

If the bail surrender the defendant, apply to Mr. *Sherwood* for that purpose, who will attend with the bail-piece before a judge, and get surrender made; pay him 5 s. 4 d.; judge's fee in term 13 s.; in vacation 13 s.; and notice must be given of such surrender, but no affidavit or *exoneretur* necessary.

For directions in the inferior courts, *vide my Instr. Cl. K. B. p. 624. 5 edit.*

Of the Writ of Ha. Corp. ad testificand.

Hab. corp. ad testificandum.

This writ is issued where a witness is confined in prison, directed to the marshal, sheriff, &c. in order to bring him before the court where the cause is to be tried, to give evidence on the part of the person who sues it out. and is called an *habeas corpus*

corpus ad testificandum, the form of which, and the mode of obtaining it, see under title *Subpœna*, p. 415.

Ha. Corp. ad satisfaciendum.

It is also made use of by a plaintiff in this court, where his prisoner has removed himself, after detention, to the *King's Bench*, to bring him into court, in order to charge him in execution upon the judgment obtained, and it is called an *habeas corpus ad satisfaciendum*, to satisfy or make satisfaction to the plaintiff, the debt and damages by him recovered; which being obeyed, the court will commit him again to the custody of the warden, where to remain until he make satisfaction.

Hab. corp. ad satisfaciendum.

This writ is always made returnable on a day certain, as the prisoner cannot be committed in execution but by the court, whilst they are sitting.

Returnable on a day certain.

A *habeas corpus ad satisfaciendum* may issue to the warden of the *Fleet*, or the keeper of any inferior prison, of a liberty or franchise, returnable in court a day certain; and the number-roll of the judgment to be indorsed upon the writ by the attorney who sues it out; and such writ shall be a good cause of detainer. *R. Mich. 1654.*

May issue to the warden, &c.

Hab. corp. ad satisfaciendum in case.

George, &c. To the warden of our prison of the *Fleet*, greeting: We command you, that you have before our justices at *Westminster*, on *Wednesday* next after the morrow of *All Souls*, the body of *C. D.* under safe and secure conduct, detained in our prison under your custody, as we are informed, together with

Hab. corp. ad satisfaciendum in debt.

George, &c. To the warden of our prison of the *Fleet*, greeting: We command you, that you have before our justices at *Westminster*, on *Wednesday* next after the morrow of *All Souls*, the body of *C. D.* under safe and secure conduct, detained in our prison under your custody, as we are informed, together with

with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* is there known, to satisfy *A. B.* 25*l.* for his damages, which he has sustained, as well by not performing certain promises and undertakings lately made by the said *C.* to the said *A.* at *Westminster*, in the county of *Middlesex*, as for his costs,

and charges by him laid out, about his suit, in that behalf whereof the said *C.* is convicted; and further to do and receive what our said court shall then and there consider of him in this behalf; and have there then this writ. Witness Sir *James Eyre*, Knight, at *Westminster*, the 19th day of *June* in the 33d year of our reign. Pay prothonotary signing 1*s.* 4*d.*, seal 7*d.*, at the *Fleet* 9*s.* 4*d.*, secondary 9*s.*, tipstaff 10*s.* 6*d.*

Roll to be in
court.

You should have the roll in court, and the secondary marks thereon the *ha. corp.* and commitment by the court, in the margin of the judgment. *R. M.* 1654. *sect.* 10.

with the day and cause of his being taken and detained, by whatsoever name the said *C. D.* is called in the same, to satisfy *A. B.* as well a certain debt of 25*l.* which the said *A. B.* in our court, before our justices at *Westminster*, recovered against the said *C. D.* also 10*l.* for his damages which he sustained by reason of the detaining the said debt, as for his costs

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Paupers.

A PAUPER, is a person said to be, by the Definition of. law, so poor and indigent in his circumstances, that he cannot dispend the usual charges to recover his right, either in *law* or *equity*.

It appears in very early times, *viz.* 1495, that Poor persons poor persons having any claim to lands or other obliged to drop right, were frequently obliged to drop the pursuit their suits on ac- thereof in a court of *law* or *equity*, the expence be- count of the ex- pences,

ing too great for them to bear : This being a great grievance to the subject, and in order that men should not be stripped of their legal possession and right, by the *Stat. of 11 H. 7. c. 12.* It is enacted,

That every poor person or persons, which have, or Every poor per- hereafter shall have cause of action, &c. shall have son shall have original writs, &c. nothing taking for the same, writs without counsel, attornies, and all other officers requisite expence. and necessary for the speed of the said suits to be had and made, which shall do their duties, without any reward for their *counsels*, *help*, and *business* in the same.

The courts of justice have fixed the sum to be Not to be worth under five pounds (*except wearing apparel, and his* 5l. except, &c. *right to the matter in question*). *Lil. Prac. Reg.*

333. Therefore, if the plaintiff is so poor as above How to sue. stated, he must petition to one of the judges of this court to be admitted to sue *in forma pauperis* ; and if he has begun the suit, and not able to carry on the same, yet he may, after petition, be admitted. *Andr. 306. 3 Wils. 24.* Ingross it on a treble 6d. stamp paper, annex also the affidavit thereto on treble 6d. then take same to the judge's chambers, and after oath is made thereof, the clerk will make out an order thereon ; pay him 2s. 6d. The form of the petition and affidavit are as follow :

In

In the Common Pleas,

A. B. plaintiff,
and
C. D. defendant.

To the Right Honourable Sir James Eyre, Knight
Lord Chief Justice of his Majesty's Court of Com-
mon Pleas.

The humble Petition of *A. B.*

Sheweth,

If the action is
not begun, then
say, "And your
petitioner hath
not as yet com-
menced any ac-
tion against him,
being unable,
&c."

That the said defendant is and stands justly in-
debted unto your petitioner in the sum of 10*l.* for
the work and labor of your petitioner, done for
the said defendant, at his request; and your peti-
tioner hath commenced an action against him for
the same.

That your petitioner finds himself unable to
carry on the said cause, on account of his extreme
poverty, as appears by the affidavit hereto an-
nexed.

I humbly conceive that
the said petitioner hath
good cause of action a-
gainst the above-named
C. D. and humbly accept
to be his counsel.

G. B.

"Your petitioner therefore
"most humbly prays you
"Lordship, that he may be
"admitted *in forma pauperis*
"to prosecute his said
"action, and that *G. B.*
"serjeant at law, may be
"assigned to him as his
"counsel, and *A. G.* his
"attorney, to prosecute his
"said suit.
"And your petitioner sheweth
"ever pray, &c.

In the Common Pleas.

A. B. agt. *C. D.*

Affidavit.

A. B. of, &c. yeoman, maketh oath and faith-
That he is not worth *five pounds* in all the world
(save and except the matters in question in this
cause, and also his wearing apparel).

To pay no fees.

The pauper, upon the order being made, may
sue out his writ without stamps, pay no fees to any

of the officers ; no stamps are used for the record, venire, or hab. corp. nor do you pay for setting down the cause, or return of hab. corp.

But if you recover a verdict, the officers take the court fees, and in them they include passing the record, &c. if above five pounds, the pauper being by them deemed *dives*. The declaration is in the common form, to which you annex a copy of the petition, order, and affidavit, and deliver to defendant's attorney. If the defendant brings error, you must pay the clerk of the error his fees.

Unless he recovers 5l. or more.

He is not liable to pay the costs for judgment, as in the case of a nonsuit, 3 *Wils.* 24. *Blook v. Lee*, nor to pay the costs before he brings a new action, if it does appear that he has not been vexatious, *Sir.* 878. If he has been vexatious, as giving six notices of trial, and not proceeding, the court will dispauper him, but not make him pay costs. *Ibid.* 983.

Not for judgment, as in the case of a nonsuit.

May be dispaupered, if vexatious.

But he is liable to pay costs for not proceeding to trial, and so for all defaults as an executor should pay. *Cooke's Rep.* 47. *Walker v. Parker*.

For not proceeding to trial.

A person admitted *in forma pauperis*, can only sue in that cause for which he is admitted, so that if any other cause arises, he must be admitted again *de novo*, et sic toties quoties. *Lil. Reg.* 633.

Can only sue in that cause he is admitted.

A pauper shall not pay costs, though dispaupered ; if taken in execution for costs, he shall be discharged upon motion. *Fort.* 320. 1 *Roll. Rep.* 81. 1 *Sid.* 261. 2 *Dan.* 224.

It has been denied to a defendant to defend *in forma pauperis*, in this court, *Barnes* 328. for the statute extends to plaintiffs only.

Denied to a defendant.

Consolidating of Actions.

How to consolidate.

IF there be two or more actions brought upon the same policy of assurance against the underwriters, or two or more ejectments on the demise of the same lessor of the plaintiff for the same premises, and they proceed separate, the defendants may apply to the court by way of motion to consolidate such actions, *Barnes* 176. after plea pleaded; if in term time, it is a rule to shew cause; if in vacation, by way of summons, before a judge; and upon their undertaking to be bound, and concluded, in all the actions, by the fate of the verdict in the action brought against the first defendant, and to bring no writ of error, the court will stay all the proceedings in the last actions until further order; but all the rules must be paid for separate, as also the summonses and orders thereon: and if the verdict turns in favour of plaintiff to the satisfaction of the judge who tried the cause, the plaintiff may proceed to tax his costs on that verdict, and get the defendant's attorney to attend the prothonotaries, who will tax the costs in the other actions, which if complied with (as is usual), and they are not paid with the debt, move the court on an affidavit of the facts, for leave to enter up the judgment, and take out execution thereon; and that the prothonotary may tax the costs in all the causes, and for the costs of the application; one stamp for the affidavit is sufficient, which the court will order, after the costs are taxed; they are to be paid within a limited time, if not, sign the judgments upon a double half-crown stamp, and take out execution thereon; you pay for separate rules, and serjeant's fees are not fixed.

Two actions for words, the one by a man and wife, and the

Two actions for words, and two declarations; in the first cause the words were laid to be spoken by the wife of *Vincent*, in the latter by *Vincent* himself,

self, each containing six counts. Motion that these two actions might be reduced or consolidated into one, because both required the same pleas; that the husband and wife were one person in law in civil suits, and the husband was liable to pay all the damages, both for his own and his wife's slander. *Per Cur.* This cannot be done, for it would be error to join the wife in a declaration for words spoken by the husband only; and the declaration would be ill either on demurrer or in arrest of judgment. *Swithin & ux. v. Vincent.* 3 *Wils.* 227. *Vide my Instr. Clerk. K. B.* 5 *Ed.* 632.

other against wife only, cannot be consolidated.

Abatement by Death.

The general rule to be observed in this case is, that where the death of any party happens, and yet the plea is in the same condition as if such party were living, there such death makes no alteration or abatement of the writ. 10 *Mod.* 251. *Gil. C. P.* 242.

The rule to be observed.

By the 8 & 9 *W. 3. c. 11. sect. 6.* If any plaintiff happen to die after an interlocutory judgment, and before final judgment obtained, the said action shall not abate therein, if such action might be originally prosecuted, or maintained by the executors or administrators of such defendant, and a *scire facias* may be had thereon.

If after interlocutory judgment plaintiff dies, executor may have *sci. fa.*

That if there be two or more plaintiffs or defendants, and one or more of them should die; if the cause of such action should survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not thereby be abated; but such death being suggested upon the record, the action shall proceed against such defendant or defendants surviving. *Ibid.*

If one plaintiff dies, action may proceed.

By the *stat. 17 Car. 2. c. 18.* It is enacted, That the death of either party between verdict and judgment, shall not be alledged for error, so as judgment be entered within two terms after such verdict.

Death of either party between verdict and judgment, not error.

Death before affize, suit abates; if after the day, not.

If either party die before the affize, it is out of the statute; but if after the affizes, though before trial, it is no error; for the affizes is but one day in law, *Salk. 8. pl. 21. 2 Ld. Raym. 1415.* If after verdict, and before the day in bank, the plaintiff dies, and the defendant signs judgment the second term after the verdict, this is within the statute, and the same as if he had entered judgment on the roll. *Sid. 385. 1 Wils. 302. Earl v. Brown.* But there must be a *sci. fa. Ibid.*

Ejectment against baron and feme, baron dies between the day of nisi prius and day in bank, it is good against the feme.

If feme takes husband after verdict, and before the day in bank, she shall have judgment, but a *sci. fa.* must be sued.

If pending an argument, plaintiff dies, the suit does not abate.

So if defendant dies.

A feme sole cannot by marriage abate her writ.

If she be sued, and takes husband, writ does not abate.

An ejectment against baron and feme, after verdict for the plaintiff, baron dies between the day of *nisi prius* and the day in bank; adjudged that the writ should stand good against the *feme*, because it is in the nature of a trespass, and the feme is charged for her own act; and the action survives against her; so if the wife had died, the baron should have judgment entered against him. *Cro. Jac. 356. Cro. Car. 509. Roll. Rep. 14. Mar. 469.* If a feme sole plaintiff *after verdict*, and *before the day in bank*, take husband, she shall have judgment, *Cro. Car. 232.* but a *sci. fa.* must be sued out before execution.

If pending an argument on a special verdict, and the court takes time to consider thereon, the plaintiff dies; the judgment will be ordered to be entered up as of the term in which judgment ought to have been signed. The like may be done if the defendant dies. Yet his representative must sue out a *seire facias* before he can have execution; and if execution is executed without it, it shall be set aside, and the money levied returned. *1 Wils. 302. Earl v. Brown.*

A feme sole cannot abate her own writ by marriage, for this would be taking advantage of her own act. *2 Roll. Rep. 53.*

If a feme sole be sued, and after she takes husband, it is no abatement of the writ; for the plaintiff would be in a fine condition, if, after he had arrested a woman, she shall be allowed to overthrow

the proceedings by a subsequent marriage. *Lord Raym.* 1525. 2 *Str.* 811.

The law abhors multiplicity of actions; and therefore whenever it appears upon record, that the plaintiff has sued out two writs against the defendant for the same thing, the second writ shall abate: for if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer *ad infinitum*; but then it must plainly appear to be for the same thing. *Mod.* 418. 539. 5 *Co.* 61. *Vide* my *Instr. K. B.* 5 *Ed.* 633.

If there are two suits pending for the same cause of action, the second suit shall abate.

If action be brought in *inferior court* against a *feme sole*, and she afterwards marries, and removes the cause, and plaintiff declares against her as a *feme sole*, she may plead coverture: but upon motion on the return of the *habeas corpus*, the court will on affidavit grant a *procedendo*. 1 *Salk.* 8. *Sid.* 40. *Cro. Car.* 104.

Feme sole removes cause, how to proceed if she becomes covert.

Suggestion on Record.

London, (fl.) *C. D.* late of, &c. merchant, was attached to answer *A. B.* and *E. F.* of a plea of trespass on the case; and thereupon the said *A. B.* by *S. U.* his attorney, comes, and the said *E. F.* cometh not; and the said *A. B.* gives the court here to understand, and be informed, that after the issuing the original writ, and before the return thereof, and before this day, to wit, on the day of 1793, at London aforesaid, to wit, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, the said *E. F.* died, and the said *A. B.* survived him, which the said *C. D.* doth not deny; and thereupon the said *A. B.* by his attorney aforesaid, complains, *For that whereas*, the said *C. D.* on the day of in the year of our Lord 1782, to wit, at London, &c. was indebted to the said *A. B.* and the said *E. F.* his partner, in 20 l. of lawful money, &c. for divers goods, wares, and

Suggestion on the declaration of the death of one of the plaintiffs after writ sued out.

Suggestion.

merchandizes, by the said *A. B.* and *E. F.* in his life time before that time sold, &c.

Suggestion of the death of one of the plaintiffs after issue joined.

Go to the end of the issue. The same day is given to the parties aforesaid here, &c. then say, Before which day, to wit, on the day of in the year aforesaid, at *London* aforesaid, in, &c. the said *A. B.* suggests to the court here, according to the form of the statute in such case made and provided, that the said *G. H.* died, and the said *A. B.* survived him, which the said defendant doth not deny: and the said defendant by his said attorney came; but the said sheriff did not send the said writ, nor did he do any thing thereon, therefore, as before, it is commanded to the said sheriff, that he cause to come before our said Lord the King, here, on

twelve, &c. by whom &c. and who neither, &c.

Suggestion of the death of one of the defendants after verdict.

To the end of the *poslea*. And upon this the said plaintiff says, that after the last continuance of the plea aforesaid, to wit, on the day of in the year aforesaid, at, &c. in the county aforesaid, the said *C.* died, and this is not denied; therefore let all farther proceedings against the said *C.* cease; whereupon the said plaintiff prays judgment against the said *F.* for the damages, costs, and charges aforesaid, by the jury aforesaid, in form aforesaid assessed, to be adjudged to him, &c. therefore it is considered, &c.

After issue joined, and before day of *nisi prius*, one defendant died. Plaintiff sued *ven. fac.* as between him and surviving defendant, and made *jurata* agreeable, held well.

After issue joined, and before the day of *nisi prius*, one of the defendants died, plaintiff sued out a *ven. fac.* between him and the surviving defendant, and made the *jurata* agreeable thereto. Verdict for plaintiff; objected at the trial, that the death of the deceased defendant ought to have been suggested on the record of *nisi prius*, and thereupon an award entered of a *ven. fac.* between plaintiff and the surviving defendant. The point reserved was now argued, and thereupon the plaintiff now produced the roll in court, wherein the *suggestion* and award of the *ven. fac.* as above were entered, which the court

Suggestion.

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court held to be sufficient. No continuances are necessary to be inserted in the record of *nisi prius*.
Doe v. Far. Barnes 469. 1 Burr. 363.

Suggestion on the London Act.

By 3 Jac. 1. c. 15. s. 4. If in any action of debt or action upon the *case*, upon an *assumpsit* for the recovery of any debt, to be sued or prosecuted against any citizen and freeman of the city of London, in any of the king's courts at *Westminster* or elsewhere, out of the court of *Requests*, it shall appear to the judge where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to 40s. and the defendant in such action shall duly prove, either by sufficient testimony or his own oath, to be allowed by any judge or judges of the said court, that at the time of the commencing such action, such defendant was inhabiting and residing in the city of London, or the liberties thereof; that in such case the said judge shall not allow the plaintiff any costs of suit, but shall award him to pay costs to the defendants.

A creditor suing in another court shall pay costs, and recover none.

By 14 Geo. 2. c. 10. It shall and may be lawful to and for every citizen and freeman of the city of London, and every other person or persons who do or shall rent or keep any *shop, shed, stall, or stand*, or *seek a livelihood*, in the said city or liberties thereof, which now have, or shall hereafter have any debts owing, not exceeding 40s. by any persons whatsoever, *inhabiting, or seeking a livelihood*, within the said city or liberties thereof, during their respective *inhabiting* within the said city, &c. or *seeking a livelihood*, as aforesaid, to cause such debtor to be summoned to appear before the commissioners, &c.

Debts not exceeding 40s. to be recovered in the court of Requests in London.

If the plaintiff does not recover the sum of 40s. against any of the persons above-described, the defendant may, the next term after verdict, apply to the court upon affidavit, "*That he was at the time of commencing the action, an inhabitant and resident*"

The *Westminster*, and most of the other acts, must be pleaded, Affidavit.

“ within the city, &c. for a rule to shew cause,
 “ why a suggestion should not be entered upon the roll
 “ by way of suggestion, that the defendant was resident
 “ in the city of London, in order to have the benefit
 “ of the statute, 3 Jac. 1.” Serjeant’s fee is half a guinea, which is drawn up at secondaries; serve copy on plaintiff’s attorney, and if no cause shewn, make affidavit of the service thereof, and move to make it absolute; serjeant one guinea; tax the costs on the rule with the prothonotary upon his appointment.

If judgment goes by default, no suggestion.

If the defendant suffers judgment to go by default, he shall not be entitled to a suggestion; for not being in court, he shall not be received for that purpose. *Brampton v. Crabb, Str. 46.*

Costs to be allowed of application.

The costs of the application shall be allowed in the taxation, as well as of the former proceedings. *Str. 1120.*

Damages given by verdict under 40s. defendant resident in *Middlesex*, and liable to be summoned to the county court, leave given to enter suggestion.

Verdict for plaintiff for 1*l.* 8*s.* 9*d.* defendant (the damages being under 40*s.*) upon an affidavit that he was resident in *Middlesex*, and liable to be summoned to the county court, moved for leave to enter suggestion of that fact upon record, pursuant to *Stat. 23 Geo. 2.* no certificate having been granted at the trial, to prevent defendant’s taking advantage of that statute, in opposition to this motion; no affidavit denying the fact contained in defendant’s affidavit, was produced by plaintiff, but it was sworn that defendant before trial offered plaintiff 2*l.* 2*s.* and costs; and it was observed, that plaintiff had given evidence on some, not on all, the counts in his declaration, that he had proved a larger debt than 40*s.* which had been reduced by a set-off on defendant’s part to the sum recovered, and that if plaintiff had been nonsuited, he would have been liable to single costs only. The court held they were bound by the finding of the jury. Rule absolute for leave to enter the suggestion: plaintiff may traverse it, if he thinks fit afterwards: the suggestion having been entered, defendant moved for judgment thereupon. Rule, that

that unless plaintiff plead to the suggestion by the first day of next term, it is to be taken for true, and prothonotary is to allow double costs to defendant according to the statute. *Fitzpatrick v. Pickering. Barnes 470.*

Action for use and occupation, and on several other counts for above 40s. on *non assumpsit*; plaintiff recovered 28s. on another count. Motion for leave to enter on the roll by way of suggestion, that defendant was resident in the county of *Mid-dlesex*, in order to have the benefit of the late statute, and an affidavit of defendant's residency was read. *Per Cur.* We are bound to give the defendant leave to enter the suggestion prayed by the act, and the plaintiff may traverse it if he pleases, and it is not in our discretion whether we will grant this or not. By the verdict we must take it, there was no more money originally due to the plaintiff than 28s. and therefore the *poslea* must be delivered to the defendant, with leave to enter the suggestion prayed. *Fitzpatrick v. Pickering. 2 Wils. 68.*

If the plaintiff's demand be for 15l. 13s. 9d. and reduced to 1l. 13s. 9d. by payments made under the plea of *non-assumpsit* to plaintiff (and took no advantage of his notice of set-off), it was held that a suggestion upon the act might be entered. *Barnes 353. Benson v. Hemming. Vide my Instr. K. B. 5 edit. 635.*

Verdict for 28s.
Motion for leave to suggest that he resided in *Mid-dlesex*, the court are bound to give leave.

But when payments are given in evidence on the plea of *non assumpsit*, and verdict under 40s. a suggestion, &c.

Discontinuance.

The definition
of the word,

DISCONTINUANCE is a word compounded of *de* and *continuo*, for *continuo* is to continue without intermission; by addition of *de* (*Euphoniae gratia dis*) to it, which is privative, it signifieth an intermission; *discontinuo* nihil aliud significat quam *intermittere, desuescere interrumpere*; and it is a very ancient word in law, and hath divers significations, as a discontinuance of process where it ought to be continued; so likewise of pleadings, &c. or discontinuance of the suit, where it is brought wrong, or the plaintiff does not think proper further to prosecute his suit. *Co. Lit.* 325. a.

After demurrer
joined and entered,
cannot discontinue
without motion.

The plaintiff cannot discontinue his action after demurrer joined and entered; or after a verdict on inquiry, without leave of the court. *Cro. Jac.* 35. 1 *Lil. Abr.* 473. It has been ruled, that plaintiff may discontinue upon motion after a special verdict, which is not complete and final, but never after a general verdict. 1 *Salk.* 178. 1 *Nels.* 663.

Court refused a
rule after judgment
on demurrer.

After judgment on demurrer (but not entered on record) and error brought, and bail put in thereupon, Court refused a rule to discontinue without payment of costs on the writ of error. *Pym v. Warren.* *Barnes* 169.

Administrator
cannot discontinue
without costs.

Per Cur. Plaintiff an administrator cannot discontinue without costs. *Hall, Ad. v. Norton.* *Barn.* 169.

After special
verdict.

Plaintiff after special verdict, not allowed to discontinue in order to adduce fresh proof in contradiction to the verdict. *Roe v. Gray.* 2 *Black. Rep.* 815.

But before or
after declaration
he may by side-
bar rule.

The plaintiff may, if he sees occasion, discontinue before or after declaration delivered, and I take it after issue joined, by applying to the secondaries in term time for a treasury rule; but you must go before the judges for that purpose; pay rule

rule 4 s. 6 d. ; get appointment thereon to tax the costs by the prothonotary, then make copy and serve it on defendant's attorney ; if he does not attend, make another copy, and take another appointment thereon, which serve as before, and so the third time ; if no attendance, the prothonotary taxes the costs *ex parte*, which must be paid forthwith, as the rule is conditional, and has no effect until payment is made. *Vide my Instr. K. B. edit. 64c.*

Popular Actions.

Compounding them.

By statute 18 Eliz. c. 5. s. 3. No informer or plaintiff shall compound or agree with persons that shall offend against any penal statute, but after answer made in court unto the information or suit ; or after answer, but by order of that court : that any person shall offend, in making of composition, &c. or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty's courts at *Westminster*, and be convicted, shall stand in the pillory, &c. and be disabled to be plaintiff or informer in any suit, &c. upon any statute, popular or penal ; and forfeit ten pounds, &c. *Sec. 4.*

No informer shall compound with defendant, but by the consent of the court.

Provided also, That not to restrain any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty, or suit is, or shall be specially limited or granted by virtue of any statute, and not generally to any person that will sue. *Sec. 6.*

Penalties given to persons certain, not generally.

It seems clear both from the preamble and the whole tenor of this statute, that it extends only to suits by common informers, and not to those by party grieved. 2 *Haw. 279.*

It extends only to suits by common informers.

Action on statute of usury. Defendant pleaded. Motion by *Draper* for leave for the prosecutor to compound on the *Stat. 18 Eliz.* *Bootle* consented to the defendant ; and a rule was made pursuant to

Leave given under statute of usury.

On compound-
ing a penal ac-
tion, the king's
part of the com-
position to be
paid first.

On a bona fide,
but not on a col-
lusive composi-
tion, the plain-
tiff may also be
allowed a rea-
sonable sum for
his costs.

Denied upon a
small composi-
tion.

How to proceed.

Affidavit.

to the motion. *Barnes's Notes*, 118. *Bland Featherstone*.

On an action *qui tam*, for offences against the Lottery Act, it was moved last term on the part of the defendant *Ellis*, in order to avoid imprisonment, and consented to by the plaintiff, and so ordered by the court, that the plaintiff have leave to compound with the defendant for 250*l.* being moiety of the penalty; so that 250*l.* be also paid into the hands of one of the prothonotaries for his majesty's use. And now *Davey* moved for an attachment against *Ellis*, for not having paid the king's moiety, upon an affidavit that he had paid the 250*l.* to the plaintiff's attorney; who swore he believed, when he received it, that the king's moiety had been previously paid. Rule to answer the matters of the affidavit; which was afterwards discharged, on the prothonotary's certificate of the subsequent payment of the said 250*l.* *Wood, qui tam, v. Ellis and another.* 2 *Black. Rep.* 1154.

Leave given to compound an action for the penalties of the Lottery Act, at 50*l.* for the king, and 50*l.* for the plaintiff, besides 60*l.* towards the plaintiff's costs; the king's part being first paid to the prothonotary at the making of the rule. *Wood, qui tam, v. Johnson.* 2 *Black. Rep.* 1157.

But it was denied at 5*l.* 5*s.* for the king, and 5*l.* 5*s.* for the plaintiff, and 30*l.* towards costs, such composition being manifestly collusive. *Id.* 1157. *Wood, qui tam, v. Cassin.*

The defendant must first pay into court the sum of money for the king's share of the penalties, and obtain the prothonotaries receipt or certificate shewing that the money is paid into court, and the receipt or certificate must be produced when the motion is made for leave to compound, with an affidavit of the plaintiff, to the following effect: *A. B.* of, &c. the plaintiff in this cause makes oath, and saith, That this action is brought for 500*l.* for certain penalties incurred by the defendant upon or by virtue of an act of parliament made, &c.

re state the title of the act). And this deponent
her faith, That it hath been agreed to apply to
honourable court for leave to compound this
on, upon condition of defendant's paying the
of £. to the crown, and £. to this de-
ment, together with the costs of this suit, and of
application to be taxed. And this deponent
her faith, The above terms are the real and
terms upon which this cause is to be com-
mended, and no other whatever; and that he this
onment hath not received, nor hath or have any
son or persons whatsoever received for his use,
doth he intend hereafter to have, demand, or
give, of the defendant, more than the sum of
as above-mentioned; nor is any person or
sons by his order or appointment, or for his use,
for the use of any other person or persons, to
knowledge, or with his privity or consent, to
or receive, for the compounding this action,
more than the said sum of £. and the costs to
taxed.

The plaintiff and defendant must each have a ser-
at, the one *to move for leave to compound*, and the
er *to consent*. Fee 10s. 6d. each; in the even-
draw up rule with the secondary, and serve copy
the opposite attorney. *Vide my Instr. K. B.*
dit. 645.

Arbitration.

ARBITRATION, or arbitrage, is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels, personal wrong, to the judgment of two or more arbiters or arbitrators who are to decide the controversy: and if they do not agree, it is usual to add that another person be called in an umpire (*impator* or *impar*), to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award; and thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or a judgment of a court of justice. Experience has shewn the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult, and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversies where causes are depending, as those where no action is brought, and which still depend upon the rules of the common law: enacting by *Stat. 9 & 10 W. 3. c. 15*. That all merchants and others desiring to end any controversy (for which there is no other remedy but by personal action or suit in equity) may agree, that their submission to arbitration or umpirage of any person &c. shall be made a rule of any of his majesty's courts of record; which agreement, &c. shall upon producing an affidavit made by the witnesses thereunto, or any of them, in court, be entered and filed of record of the said court, and a rule shall thereupon be made by the same court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, &c. And in case of disobedience,

Merchants, &c.
desiring to end
controversies by
arbitration, may
agree their sub-
mission to the
award of any
person,

In case of dis-
obedience, party

obedience, the party neglecting shall be subject to all the penalties of contemning a rule of court; unless such award shall be set aside for corruption or other misbehaviour in the arbitrators or umpire, proved on oath to the court before *the last day of the next term after the award is made.*

neglecting, subject to attachment, unless, &c.

In consequence of this statute it is now become a considerable part of the business of the superior courts to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt as is awarded for disobedience to those rules and orders which are issued by the courts themselves. But in a case where the parties attempted to set aside an award, Lord *Hardwicke* said, that the only ground to impeach an award, is collusion, or gross misbehaviour of the arbitrators, or otherwise it is final and binding upon all parties; otherwise no persons would ever undertake to be arbitrators. 3 *Atk.* 529.

May set award aside, when partially or illegally made.

Impeachment, the ground of.

Where the objections arise upon the face of the award, they may be made at any time; but where the party complains of corruption or ill practice, he must do it within the *second term.* *Barnes* 56. *Stephenson v. Browning.*

Within what time to make the objection.

N. B. This means after a rule of reference.

An award of general releases, on a special reference, is good for the matters referred, and void as to the rest. *Pickering v. Watson.* 2 *Black. Rep.* 1117.

If an award is made, and the party will not perform it, such as not paying the money, &c. at the time and place therein mentioned, and you have attended for that purpose ready to receive it; first proceed to make the submission a rule of court, upon an affidavit of the due execution of the bond, thus:

If an award is made, then to proceed by making the submission a rule of court.

C. G. of, &c. maketh oath and faith, That he was present at the time of signing and sealing the bond or obligation hereunto annexed, and *C. D.* of, &c. therein mentioned, did duly sign, seal, and

Affidavit of the due execution of the bond.

as his act and deed deliver the said bond, in the presence of this deponent, and that the name *C. D.* set and subscribed opposite the seal of the said bond is of the proper hand-writing of the said *C. D.* and that the name *C. G.* set and subscribed as the witnesses thereto, is of the proper hand-writing of the deponent.

How to proceed to get an attachment.

This affidavit is to be ingrossed on a treble six penny stamp paper; give it to a serjeant "*to make the submission a rule of court,*" pay him 10s. 6d.; draw up the rule with the secondary pay according to length, make copy thereof, and of the award, with the names of the arbitrators and witnesses, then the person who is to receive the money must demand the same, which not being complied with, make the following affidavit to move for an attachment, and also an affidavit of the due execution of the award; which see p. 753.

In the *C. P.* Between $\left\{ \begin{array}{l} A. B. \text{ plaintiff,} \\ \text{and} \\ C. D. \text{ defendant.} \end{array} \right.$

Affidavit of the demand and refusal.

The place mentioned in the award.

A. B. of *Fleet-street, London*, grocer, makes oath and faith, That he this deponent did, on the 4th day of *June* last, personally attend from the hour of one until the hour of two of the clock in the afternoon of the same day, at the *Mitre Tavern, Fleet-street, London*, and then and there demanded of the above named *C. D.* who also attended, the sum of 50*l.* awarded due to this deponent, pursuant and agreeable to a certain award in writing which is hereunto annexed; but the said *C. D.* did not then pay to this deponent the said sum of 50*l.* or any part thereof. And this deponent further faith, That having, on *Thursday* next after one month from *Easter* day, in this present *Easter* term, caused the submission of this deponent, and the said *C. D.* to the said award contained in a certain bond or obligation, bearing date the first day of *May* 1790, to be made a rule or order of this honourable

honourable court, he this deponent, on the day of , served the said *C. D.* with a true copy of the said rule or order of this honourable court, and at the same time shewed him the said original rule or order. And this deponent further saith, That he did at the same time demand of him the said *C. D.* the said sum of 50 *l.* so awarded due to this deponent as aforesaid; but the said *C. D.* did not pay the same to this deponent. And this deponent further saith, That the whole of the said sum of 50 *l.* now remains due and owing to this deponent, pursuant to the said award.

Give affidavits to a serjeant, "*to move for an attachment for not paying the money on the award in pursuance of a rule of court,*" fee 10 *s.* 6 *d.*; it is a rule to shew cause, therefore draw up same with the secondary, and serve copy thereof; make affidavit of the service of said rule, and shewing the original rule, then give serjeant one guinea with it, to make it absolute; which being done, draw up rule with the secondary, and make out an attachment, sign it with prothonotaries, seal 7 *d.*; get a warrant thereon, and give it to your officer, pay him one guinea for the caption. The common attachment for a contempt will do, only put the substance of the rule at the foot thereof.

How to move for the attachment.

It is best for the attornies to get their witnesses sworn in court whilst they are there; pay 2 *s.* each; enter their names on a piece of paper, and the cause; give it to the crier for that purpose.

How to proceed on a rule of reference.

Get order of *nisi prius* from Mr. Edgell, or if at the affizes, of the *judges associate*, upon which the arbitrator will appoint a time and place for both parties to meet; and plaintiff's attorney serves a copy of the order of *nisi prius* on defendant's attorney; give arbitrator (if an attorney or counsel) the briefs that were delivered, if not, a copy of the case on each side, and names of the witnesses.

If the arbitrator does not finish in time, you may enlarge the order by consent; but first move that the order of *nisi prius* may be made a rule of court,

If arbitrator does not make his award in time, may be enlarged.

court, which is done by giving the order to a serjeant for that purpose, fee 10s. 6d.; draw up rule with secondary, pay according to length, serve copy on the opposite attorney, then give brief to a serjeant with 10s. 6d. to move to enlarge; and the other side also give a brief to a serjeant to consent, fee 10s. 6d. draw up rule with the secondary, pay according to length: an appointment must again be made by the arbitrator at the foot of the rule and a copy made and served as before, on the opposite attorney, to attend.

Award.

When the award is made, the arbitrator's attorney gives notice to the attornies, that the same is ready, and that each may have his part on such day, on payment of his expences.

How to proceed after award made.

If the award is in favor of the plaintiff or defendant, costs are of course given as to the suit by the rule, therefore get an appointment from the prothonotary at the foot of the rule of court to tax costs; serve copy thereof, and appointment, on the plaintiff's attorney; and, upon attendance, the prothonotary will tax the costs, and mark them on the rule; and if the party against whom the award is does not pay the money, make a copy of the rule of court, and the prothonotaries *allocatur* thereon, and also a copy of the award, and let your client the plaintiff, first examine copies thereof, then let him deliver the copies to the (*defendant*); shew the *original order and award*, and demand the money, *viz.* the sum awarded, and the costs, if he does not pay them, move on the following affidavit for an attachment.

N. B. A letter of attorney may be made for this purpose, but it is too expensive, as there must be an affidavit of the due execution, and the attendance.

Affidavit of service of rule and allocatur for costs and the demand of the money.

A. B. of, &c. the plaintiff in this cause, maketh oath and saith, That he this deponent, on the day of _____ last, personally served the above defendant with a true copy of the rule and *allocatur* and also a true copy of the award hercunto annexed

and at the same time shewed him the original rule, *allocatur* and award, and demanded of him the said defendant the payment of the sum of 20*l.* awarded due to this deponent by *W. G.* of, &c. the arbitrator named in the said award, and also the payment of the sum of 14*l.* for the costs mentioned and allowed to him the said plaintiff in the said cause; but the said defendant refused to pay the same, or any part thereof, and the same still remains due and owing from him the said defendant to this deponent.

W. T. of, &c. gentleman, maketh oath and saith, That he did see *W. G.* of, &c. sign, seal, publish, and declare his final award and arbitrament between *A. B.* of, &c. merchant, and *C. D.* of, &c. wool-len-dra- per, bearing date the day of

Affidavit of due execution of the award to be made by one of the witnesses.

, 1789; And this deponent further saith, That the name *W. G.* set and subscribed against the seal as the party executing the said award, is of the proper hand-writing of the said *W. G.* and that the names *W. T.* and *J. E.* set and subscribed thereto as witnesses, attesting the execution of the said award, are of the respective hand-writings of this deponent and the said *J. E.*

Frequently where there is bail, and a reference is proposed at the trial, the plaintiff, to save the bail, takes a verdict, subject to the reference; in that case, when the award is made, if in favour of the plaintiff, he may make his election whether he will proceed or not under the rule of reference, or on the verdict: if he proceeds in the latter, the costs must first be taxed; copy rule and award, serve same and demand the sum awarded, and costs, in the same manner, as if he meant to proceed under the rule; and on affidavit of service of the rule, the prothonotaries *allocatur* thereon, and a copy of the award, and demand of the money. *Barnes* 58. *Read v. Garnett*. Move the court that the *posse* may be delivered to the plaintiff, in order to take out execution for the money awarded and costs, which being made, draw up the rule as usual with the secondary, make affidavit of the service, and, shewing

When bail is taken, and a verdict subject to reference, how to proceed.

the original, and on motion, the court will make the rule absolute; draw up same, and apply to the marshal for the *possea*, who, on producing the rule, will give it to you: sign judgment with the prothonotaries (first stamping the *possea*); get the prothonotary to tax the costs, and then take out execution. *N. B.* You are entitled to all the subsequent costs. If the award is for a less sum than the verdict, enter a *remittitur* on the roll, and levy for the sum awarded and costs only.

If verdict be taken, and award made, affidavit of the due execution of award, and demand of money, necessary to move for execution,

Verdict for plaintiff for security. Reference by rule to three of the jurors. Award in plaintiff's favour. Rule obtained to shew cause why the *possea* should not be delivered to plaintiff, to take out execution for the money awarded. Objection by defendant, that no affidavit was produced of the due execution of the award, or of a demand of the money, which the court held to be as necessary as if the motion had been for an attachment; and the rule was discharged. *Read v. Garnett. Barnes 58.*

The court will compel a witness to make an affidavit of the execution of the bond, on refusal. *Barnes 58.*

Corporations.

CORPORATIONS aggregate must sue and defend by attorney; and therefore the proper process against them is by original, *Co. Lit.* 66. b. They cannot be outlawed, 10 *Co.* 32. b.; nor can they be attached. As outlawry does not lie against a corporation, therefore trespass does not lie against them; for a *capias* and *exigent* do not go. *Bro. Abr.* title *Corp.* 43.

If a corporation sue, they must sue in the name of the corporation, by an attorney appointed under the seal of the corporation.

And if sued, it must be sued by its name of incorporation by original writ; and in order to sue a corporation, the plaintiff's attorney must make out a *præcipe* for an original writ, which must be taken to the curfitor of the county where the *venue* is laid; after it is sealed, take it to the sheriff's office, and get a summons thereon, pay 2 s. 4 d. officer 5 s.; if they appear, then proceed against them as in other cases; if not, upon *summoniri fecit* being returned by the sheriff, file the original with the *custos brevium*, pay 4 d. and for an abstract of the writ and return 6 d.; make out a *distingas* as against a member, and proceed to distrain in the same manner: but I believe it seldom happens that a *distingas* goes, as their town clerk generally appears, if of a *borough or city*; if of a *college*, an attorney is properly appointed.

Defendants, the bailiffs and burgesses of *East Retford*, were sued in their corporate capacity, by common *capias ad respondendum*; and upon affidavit of service, an appearance was entered according to the statute; and plaintiff entered a declaration in the office, reciting that defendants *were attached to answer*, which cannot be. Defendants moved to set aside the *capias* and proceedings thereon; objecting

Præcipe to be filed with *Custos brevium*.

How they must sue.

And if sued, how.

N. B. A warrant or minute must be filed on a 2s. 6d. stamp.

Capias ad respondendum and proceedings thereon against defendants in a corporate capacity set aside, they should be sued by *pone* and *distingas*.

they ought to be sued by *pone* and *distringas*. And the court were of opinion, that as defendants are sued in a corporate capacity, the *capias ad respondendum* is null and void; and rule to shew cause was made absolute. It was agreed, that had the defendants themselves appeared, the objection had been waived. *Barnes* 415. *Langley v. Bailiff, &c. of East Retford*.

May sue as
others.

But a corporation may sue in the common way as others, by *capias*.

Declaration
against a cor-
poration.

Oxon, (ff.) The mayor, bailiffs, and commonalty of the city of *Oxford*, were summoned to answer *John Denn*, in a plea of trespass on the case; and whereupon the said *John*, by S. U. his attorney, complains, *That whereas*, the said mayor, &c.

Appearance.

The appearance is entered with the filacer, and a *præcipe* is made thus: *Oxon*, (ff.) Appearance for the mayor, bailiffs, and commonalty of the city of *Oxford*, ats. *John Denn*, to an original returnable on the morrow of *All Souls*. *J. K.* Attorney.

N. B. A memorandum or minute is to be delivered on a 2s. 6d. stamp.

Feigned issue, vide *my Instr. Cler.* 5 ed. *K. B.* 641.

Hundredors.

IF an action be commenced against hundredors, *Must be by original.*
the suit must be by original; a *precipe* is to be taken to the cursitors, and proceed as against corporations.

To proceed against an hundred on the statute of hue and cry, 13 *Ed.* 1. the plaintiff must take out his original writ, which must be tested forty days after the robbery; which forty days are allowed for the hundred to take the thieves, by the statute of *Winton*, 3 *Lev.* 320.; and within a year after the robbery. 1 *Brownl.* 154. *How.*

The process served is a copy of the original writ, which process formerly used to be served on some inhabitant of the hundred. But by stat. 8 *Geo.* 2. c. 16. s. 4. it is enacted: That no process for appearance in any action brought upon the statutes of hue and cry, against any hundred, shall be served on any inhabitant, save only upon the high constable of the hundred wherein the robbery shall happen; who is required to cause public notice thereof to be given in one of the principal market towns within such hundred, on the next market day after he or they shall be served with such process; or if there shall happen to be no market town within the hundred, then in some parish church within the same hundred, immediately after divine service, on the Sunday next after his or their being served with such process; and he is impowered to enter an appearance in the said action, and also defend the same on behalf of the inhabitants of the said hundred, as he shall be advised. *Copy original is served.*
High constable only to be served with the process, who is to give public notice thereof the next market day.

If the defendants plead, and there is an issue, the *venire facias*, by stat. 29 *Geo.* 2. c. 18. s. 3. shall be awarded *de corpore comitatus*, except the hundred against which the action is brought. *Venire facias to whom awarded.*

If judgment be given against the hundred, the sheriff, &c. upon receipt of any writ of execution against the hundred, the

sheriff to shew
the writ to two
justices, who are
to tax and levy
the charges, as
by Stat. 27 Eliz.
c. 13.

against any inhabitant, instead of serving the same, shall cause the same to be shewn *gratis* to two justices of the county, riding, or division (whereof one to be of the *quorum*), who are to cause such taxation and assessment to be made, and to be levied according to the 27th *Eliz.* (*viz.* by the constables, &c. rateably and proportionably, &c.), in which taxation and assessment there shall be provided and included, over and above what the costs and damages recovered by the plaintiff in such action shall amount to, all such just and necessary expences, which the high constable of the hundred hath been at in defending such action, claim being made thereto by such high constable, before the said justices, upon due notice for that purpose given him; and the money so to be levied, to be paid over by such constable, &c. *within ten days* after collection, to the sheriff of the county, to the use of the plaintiff in such action, for so much as his costs and damages recovered shall amount to, and to the use of the said high constable, for so much as his expences in defending the said action shall amount to; of which he shall give an account and make proof thereof upon oath, to the satisfaction of the said justices, before any taxation shall be made for reimbursing such high constable; and shall in such expences, have no further allowance towards paying an attorney to defend the said action, than what such attorney's bill shall be taxed at, by the proper officer of that court where the action shall be brought, which the said high constable shall cause to be taxed for that purpose. Stat. 8 Geo. 2. c. 16. §. 4.

The 7th section of the above act provides, in what manner the constable shall be reimbursed his expences, in case the plaintiff is nonsuited, &c. and becomes, or his sureties in the bond become, insolvent.

For proceedings against justices and constables, vide my Instr. Cler. K. B. 5 ed. 653.

For proceedings against officers of excise, 657.

Replevin.

AN action of replevin is founded upon a distress wrongfully taken and without sufficient cause; being a redelivery of the pledge or thing taken in distress to the owner, upon his giving security to try the right, and to restore it if the right be adjudged against him. Formerly this was by a writ of replevin: but this being a tedious method of proceeding, the beasts or other goods were long detained from the owner; for which reason the statute 52 *H. 3. c. 51.* directs (without the writ) the sheriff immediately upon complaint to him made, shall proceed to replevy the goods. And for the greater ease of the parties, security is to be given, in pursuance of the statute 13 *Ed. 1. c. 2.* that the party replevying will pursue his action, for which purpose he puts in pledges to prosecute and pledges *de retorno habendo*. Besides these pledges, the sufficiency of which is discretionary, the statute 11 *Geo. 2. c. 19.* requires that the sheriff, &c. granting a replevin *on a distress for rent*, shall take a bond with two sureties in a sum of double the value of the goods distrained, *conditioned to prosecute the same suit with effect and without delay*; which bond shall be assigned to the avowant or person making cognizance on request made to the sheriff; and if forfeited, may be sued in the name of the assignee.

The sheriff, on receiving such security, is immediately to cause the chattels taken in distress to be restored into the possession of the party distrained upon. Either party may remove the plaint into the superior courts of King's Bench or Common Pleas, the plaintiff at pleasure, the defendant upon reasonable cause. For if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no further: so that it is usual to carry it up in the first instance to the courts of *Westminster Hall*.

When security is given.

Either party may move the plaint.

Recordare the usual writ to remove out of county court.

If the suit be in the county court of the sheriff, the most usual writ to remove the plaint is by *recordare facias loquelam*. But if it be in an inferior court of record, then it must be removed by writ of *certiorari* out of this court, because there the suit is already recorded, and the *re-fa-lo* doth not go to a court of record; pay 1s. 4d. signing, seal 7d.

The person distrained on is called *plaintiff*, and the person distraining, the *defendant* or *avowant*.

In order for a *re-fa-lo*, you make out a *præcipe* for the curfitor of the county where the distress was taken, thus:

Præcipe.

If cattle be distrained.

Effex, to wit, *Recordare facias loquelam* between *A. B.* against *J. W.* for taking and unjustly detaining the cattle, goods and chattels of the said *A. B.* returnable before his majesty's justices at *Westminster*, on the morrow of *All Souls*, on the part of *A. B.*

R. L. Attorney.

If defendant removes, say on the part of the avowant.

How to obtain writ.

This *præcipe* is taken to the curfitor of the county, at the curfitor's office, *Chancery-lane*, with a 2s. 6d. stamp warrant, pursuant to *stat. 25 Geo. 3. c. 80.* pay for same 5s. It is necessary you should inform the curfitor of the next county court day. This writ is taken to the sheriff for allowance and return, pay him for same 16s. 6d.

How to proceed if brought by the Plaintiff.

When the sheriff has returned the writ, you file it with the filacer of the county, *Barnes 222.*, who gives a rule for the defendant to appear; pay with stamp 3s. 3d.; if he does not appear within time, the plaintiff bespeaks a writ of *pone* of the filacer; pay him for same 5s. 1d. seal 7d.; get a summons from the sheriff, whose officer will serve defendant with, or leave at his house. If the defendant does not enter his appearance on or before the appearance day of the return, then on a return of *nihil* by the sheriff on the *pone*, the filacer will make out a *distringas*; pay

pay 5s. 1d. seal 7d. and proceed to distrain in the same manner as you do on a *clausum fregit* for non-appearance, *Pract. Reg.* 371. only the issues will be 40s. on the first, 4l. on the second, 8l. on the third, &c. but before he can obtain same back again of the sheriff, he must pay the costs of the several *distringas's*.

Essex, to wit, Appearance for *J. W.* ats. *A. B.* to a *recordare facias loquelam* returnable on the morrow of *All Souls*. *J. L.* Attorney.

Appearance for defendant.

N. B. A memorandum on a 2s. 6d. stamp is necessary.

When the defendant has entered his appearance, the plaintiff declares as in other cases, and gives a rule to avow, to which the plaintiff pleads in bar, and may be compelled so to do by giving a rule for that purpose with the secondaries, but before judgment a demand must be made of the avowry, or plea in bar. And if the plaintiff prevails, he is to recover his damages and costs, he having already his goods returned on pledges. *Vide Declaration*, p. 265.

When appearance is entered.

How to proceed if brought by Defendant.

A *præcipe* is made as before on the part of the defendant, and a 2s. 6d. stamp to be taken with it to the curfitor, who makes out the *recordare*; when sealed, get it returned by the sheriff, file it with the filacer, pay 3s. 3d. who gives a rule to declare, and in default thereof he signs a *nonpros* on a double half-crown stamp paper, pay him 6s. no warrant of attorney necessary to be filed. And if it be a *replevin for rent*, the defendant may then get the sheriff to assign the bond pursuant to the statute 11 *Geo. 2. c. 19.* and after getting same stamped, put it in suit same as on a bail bond.

Notice to Plaintiff of filing the Recordare.

It has been determined, that if the defendant does not file the *recordare* at the day in which it is returnable, he shall give notice to the plaintiff's attorney

attorney

torney of filing it. *Taylor v. Blaxland. Prac. Reg. 370.*

Notice ought to be given.

And the court was of opinion, that notice ought to be given in replevin of the filing of *re-fa-lo* if brought in *after the four days*, and that a declaration ought to be called for in writing, and therefore set aside the *return' habend'* which had been issued without such notice. *Cooke's Rep. 55. S. C.*

If plaint be removed by defendant, and he files recordare on appearance day, he need not demand declaration.

The plaint being removed by *recordare* on the part of the defendant in replevin, returnable in fifteen days of *Easter*, was filed with the filacer the 29th of *April 1789*, and a rule to declare given on same day: *Easter* term began that day. The defendant signed his judgment of *nonpros* for not declaring. Motion to set it aside on the ground that no demand of declaration was made; but the court held it not necessary, and discharged the rule with costs. *James v. Moody.* But no dates are there stated. I had the dates from the filacer.

When to be filed if brought by defendant without notice.

It is to be observed, that the *recordare*, if brought by the defendant, should be filed *on or before the appearance day of the return*, so as to prevent notice to the plaintiff. If not, then a copy of the rule to declare given by the filacer, must be served on him or his attorney, if known, and a demand made thereof before a *nonpros* can be signed. But if filed *in time*, the filacer has always signed a *nonpros*, without a demand being made of the declaration.

When a procedendo shall go.

If defendant brings the *re-fa-lo*, and does not get it returned and filed *within two terms*, the plaintiff's attorney must apply to the filacer for his certificate that the same is not returned and filed; which is a certificate for the cursitor of the county, to warrant him to make out a writ of *procedendo*, which is to remand the cause back to the county court again to be there determined.

If distress be not taken for rent.

In case the distress be taken for any other cause than for rent, when the rule expires for declaration, the defendant must, after *nonpros* for not declaring in due time, issue out a writ of *returna habendo*, which is made out by the filacer, then leave it

it with the sheriff for a return; if he returns *eloignatur* thereon, a writ of *capias in withernam* issues, and then an *alias* and *pluries*, which are made out by the filacer.

If the plaintiff dies after declaration, and before avowry, defendant cannot have a *retorno habend'*, but may distrain again. 2 *Wils.* 83. *Cutfield v. Corney.* If plaintiff dies,

If the cause has been removed by either party, and after the defendant has appeared, the plaintiff does not declare or proceed further; or if the cause has been removed by the defendant, and plaintiff does not declare after rule served, the defendant may sign a *nonpros*; and if the distress is made for rent, he may proceed to execute a writ of inquiry of damages pursuant to the statute 17 *Car.* 2. c. 7. (but where there is no avowry, he cannot; for where there has been no avowry, the defendant has a *nonpros* and costs. *Durham v. Price.* *Cok. Rep.* 42.) If cause removed by either party, and no declaration, a *nonpros* may be signed, and defendant may have an inquiry of damages.

which enacts, that whensoever any plaintiff shall be nonsuit before issue joined, in any suit of replevin by plaint, or writ removed in any court of *Westminster*, that the defendant making a suggestion, in nature of an avowry or cognizance for rent, to ascertain the court of the cause of distress, the court upon his prayer shall award a writ to the sheriff, to inquire, &c. the sum in arrear, and the value of the distress, of the execution of which fifteen days notice shall be given to the plaintiff or his attorney; and on return of the inquisition, the defendant shall have judgment to recover the rent in arrear, if the goods distrained amount to it, otherwise to the value of the distress, with full costs, for which he may have execution by *fi. fa. elegit*, or otherwise.

The avowry is in nature of a declaration, and the ground of an inquiry for the defendant. *Cooke's Rep.* 42.

Sec. 3. Gives the like remedy to the avowant, &c. upon a judgment given for him on demurrer.

That in all cases aforesaid, where the value of the cattle distrained as aforesaid, shall not be found to be sufficient, to distrain again.

to the full value of the arrears distrained for, that the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain again for the residue of the said arrears. *Seet. 4.*

Nonsuit, inquiry executed after second deliverance.

Nonsuit in replevin, avowant executed a writ of inquiry after a writ of second deliverance (which is a supersedeas to the writ *retorno habendo*), and held good. *Cooper v. Sherbrooke. 2 Wils. 116. Vide Barnes 426. S. C.*

If plaintiff die.

If plaintiff dies after declaration, and before avowry, there can be no writ *de retorno habendo*; but defendant may distrain again. *2 Wils. 83. Cutfield v. Corney.*

May chuse which way he will proceed.

The defendant may chuse which way he will proceed, either by taking the bond on the nonprossigned for want of declaration, or by writ of inquiry after suggestion made, *provided the distress be for rent.*

Nonsuit for want of plea in bar.

If plaintiff be nonsuited for want of a plea in bar, the avowant may sue the sureties on the bond, and need not execute the writ of inquiry for his damages. *Waterman v. Yea. 2 Wils. 41.* But where a bond was taken, and actions brought thereon, it was offered to refer the damages and costs in the original action, and the costs on the bond, to be settled by the prothonotary, which the court thought reasonable. *Ibid.*

Nonsuit after issue joined.

If the plaintiff is nonsuited after issue joined, or if a verdict is given against him, the jury shall inquire of the rent in arrear, and the value of the goods distrained, &c. *Stat. 17 Car. 2. c. 7.*

Double costs.

The 11 *Geo. 2. c. 19. s. 22.* gives defendant double costs on a nonsuit, discontinuance, or judgment. But a seizure for a heriot custom is not within the stat. *Lloyd v. Winton. 2 Wils. 28.* as to double costs.

Sheriff, &c. answerable.

Court held, that as well the high sheriff and under sheriff, as the replevin clerk, are answerable to the defendant in replevin for the sufficiency of the pledges. *Richards v. Aston. 2 Black. Rep. 1220.*

Per Cur. The same jury who tried the issue may assess the damages; but if they do not, we must do justice, and award a writ of inquiry to the sheriff, and a writ was accordingly issued. *Dowell v. Marshall.* 3 *Wils.* 442.

Same jury who try, may assess the damages.

Judgment cannot now be moved for as in the case of a nonsuit. *M. T.* 33 *Geo.* 3. So in K. B. 3 *Term Rep.* 661.

Nonsuit.

After verdict for the avowant and inquiry pursuant to the statute, the avowant shall not have the bond delivered to him to sue the parties, but must either have judgment and execution for the damages settled, or take the ancient remedy, which is to have *retorno habendo*; and if the sheriff returns *averia elongata*, then a writ to have a return of the beasts, of the pledges; and if that be returned *nihil*, then a *scire facias* against the sheriff, *quod reddat ei tot. averia*, or *tot. catalla.* *Combes v. Cole.* *Rep. Temp. Hard.* 352.

After verdict avowant shall not take bond and sue on it.

The plaintiff may pay the rent into court which the defendant avows for, and the costs. *Vernon v. Wynne.* 1 *H. Black. Rep.* 24. Or he may move to stay proceedings before declaration, on payment of the rent and costs. *Barn.* 429.

May pay rent in court.

By *stat. 4 & 5 Ann. c. 16. s. 4.* The defendant, or any plaintiff in replevin, in any court of record, may, with leave, plead as many several matters as he shall think necessary for his defence. *Vide 11 Geo. 2. c. 19. s. 22.* as to avowry and cognizance for rent, &c.

May plead several pleas with leave.

If there be two pleas of *cognizance* or *avowries*, must move to plead them, and a rule to shew cause.

If two pleas or two avowries.

So the plaintiff if he plead *in bar* two or more pleas, he must move for that purpose. If judged insufficient, costs at the discretion of this court on demurrer; or verdict for plaintiff, unless judge certify that defendant had a probable cause to plead such matter so found against him. 4 & 5 *Ann. c. 16.* Of costs, *stat. 7 H. 8. c. 4. s. 3.* 21 *H. 8. c. 19. s. 3.* 11 *Geo. 2. c. 19. s. 12.*

So may plead in bar with leave.

Costs.

Notices of Motion.

When necessary.

WHEREVER the *proceedings* are required by the party *moving* to be *staid*, in that case *notice is necessary to be given the attorney on the other side, and affidavit made of the service thereof*; as for instance, if the error happen in process, or the notice subscribed thereto, notice must be given of the motion; the like to set aside an interlocutory judgment or inquiry, the proceedings on a bail bond, to put off a trial for want of a material witness, for a new trial, or arrest of judgment: but there is no necessity to give notice for leave to pay money into court, *conciliums*, changing the *venue*, or for a special jury, view, or for leave to plead several matters.

Though in strictness, in some cases, notice of motion may not be necessary, yet it will shew, that you took the first opportunity of informing the plaintiff he was wrong; therefore, I shall here give precedents of different notices, both with respect to those cases, as well as others which may happen.

Notice not to appear to a writ where there is a mistake in it.

You having been served with a copy of a *capias*, at the suit of the above-named plaintiffs *W. C.* and *R. W.* on the day of last, to appear the third day of *November* next, by your attorney in his majesty's court of *Common Bench*, and the said writ not being returnable, I do hereby give you notice not to appear thereto, there being a mistake in the said writ. Dated. this first day of *November*, 1793. Your's, &c.

To Mr. *G. A.* the above defendant.

To set aside an interlocutory judgment.

Take notice, that this honourable court will be moved to-morrow, or so soon after as counsel can be heard, that the interlocutory judgment signed in this cause may be set aside for irregularity, with costs to be taxed by one of the prothonotaries, and
in

in the mean time all proceedings be stayed. Dated,
 &c.

Take notice, that this honourable court, &c. To set aside
 that the interlocutory judgment signed in this cause, judgment and
 and the writ of inquiry executed thereon, may be inquiry.
 set aside for irregularity, with costs to be taxed by
 one of the prothonotaries, and in the mean time all
 proceedings be stayed. Dated, &c.

Take notice, that this honourable court, &c. To set aside the
 that the judgment signed in this cause, and the judgment and
 execution issued and executed thereon, may be execution exe-
 cuted, and that
 set aside for irregularity, with costs to be taxed by one the money paid,
 of the prothonotaries, and that the sum of 56*l*. &c. be restored.
 levied and paid in the hands of the sheriff of *Mid-*
dlesex, may be restored to the above-named defend-
 ant, and the said sheriff retain the same in his
 hands until the further order of this court, and that
 in the mean time all further proceedings be stayed.
 Dated, &c.

Take notice, that this honourable court, &c. for To file common
 a rule to shew cause why the defendant should not bail.
 be permitted to file a common appearance in this
 cause, and in the mean time all proceedings be
 stayed. Dated, &c.

Take notice, that this honourable court, &c. to To set aside all
 shew cause, why all the proceedings in this cause proceedings for
 should not be set aside for irregularity, with costs to irregularity.
 be taxed by one of the prothonotaries, and in the
 mean time further proceedings be stayed. Dated,
 &c.

Take notice, that this honourable court, &c. for To shew cause
 a rule to shew cause why it should not be referred why it should not
 to one of the prothonotaries, to compute the prin- be referred to the
 cipal and interest due upon the bond in question, master, to com-
 and why, upon payment thereof, together with the pute principal
 costs to be taxed by him, the said bond should not and interest up-
 be delivered up to the defendant to be cancelled. on bond.
 Dated, &c.

Take notice, that this honourable court, &c. for To shew cause
 a rule to shew cause why the judgment signed in why judgment
 this cause should not be set aside for irregularity with should not be set
 costs, aside, and plain-

tiff answer the matter of the affidavit.

To shew cause, why the bail-bond, and the proceedings thereon, should not be set aside.

Why the writ should not be quashed, and answer the matters.

To the sheriff to retain money.

costs, and why the plaintiff should not answer the matters of the affidavit, and in the mean time all proceedings be stayed. *Dated, &c.*

That this honourable court, &c. why the bail-bond assigned in this cause, and the proceedings thereon, should not be set aside with costs to be taxed, and in the mean time all proceedings be stayed.

Take notice that this honourable court, &c. why the writ of *capias* issued in this cause should not be quashed, and why the plaintiff should not pay the costs of this application, and that the plaintiff may answer the several matters mentioned in the affidavit.

Take notice that this honourable court, &c. why the judgment in this cause, and the execution executed thereon, should not be set aside for irregularity; and why the money paid into your hands should not be restored to the defendant, and that in the mean time you retain the same until the further order of the court.

To the sheriff of the county of Middlesex, his undersheriff, and bailiff.

Error.

A WRIT of error is a commission to judges of a superior court, by which they are authorised to examine the record, upon which the judgment was given in an inferior court, and on such examination to affirm or reverse the same according to law, 2 *Inst.* 40.; and any person damnified by error in record, or that may be supposed to be injured by it, may bring a writ of error, to reverse it, whether he be party or not; but principal or bail cannot join in a writ of error.

A writ of error a commission to judges, to authorise them to examine the record.

Error lies in the K. B. of a judgment in the C. P. 1 *Roll.* 744. 4 *Inst.* 22. *Vide my Instr. Cler. K. B.* 662. 5 *edit.*

It is ordered, the clerk of the treasury shall make no certificate or return of any writ of error, to reverse or affirm any judgment given in this court, on verdict or demurrer, until some manifest error therein be notified by the party or some of his counsel that sueth the writ of error, unto the justices of the bench, or to one of them at the least. *R. M.* 6 & 7 *El.* *R. E.* 23 *Eliz.*

No certificate or return of error to be made until some error be notified to one of the justices.

The plaintiffs brought twenty-five actions on policy of insurance; a rule was obtained to consolidate, by which it was ordered, *that defendants should be at liberty to prosecute a bill in exchequer, on their undertaking not to file any other bill against plaintiffs, nor to bring any writ of error.* Verdicts for plaintiffs on trial. Costs taxed, and the damages, as well as costs, paid. All the other defendants (except one who became bankrupt) paid their subscriptions. The plaintiff's attorney was served with allowance of a writ of error in this cause; *motion why an attachment should not issue against the defendant's attorney for contempt and breach of the consolidating rule.* It appeared he was advised there was error by counsel, and defendant's attorney thought the rule only

If actions are consolidated, and in the rule no writ of error to be brought; though damages and costs are paid, and error on record, yet the court will stay the allowance of the writ of error.

bound him not to bring error for delay, the damages and costs being paid : the court discharged that part of the rule which related to the attachment ; but made the other part absolute for staying the allowance of the writ of error. *Lord Loughborough* said, It is contrary to justice to permit the defendant to proceed in the writ of error, since he has, by his own act and consent, prevented the plaintiff from pursuing the common course of law in the other actions. And it was not regular to take notice of the extra opinions of counsel. *Camden & al. v. Edie.* 1 *H. Black. Rep.* 21. It appeared the action could not have been sustained.

Remittitur entered after error brought on payment of costs.

Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a remittitur of the excess above the sum laid in the declaration on payment of the costs of the writ of error. *Pickwood v. Wright.* 1 *H. Black. Rep.* 643.

If error is confessed for delay, court will order an execution.

If the defendant's attorney admit that the writ of error is brought for delay, and to drive the plaintiff to terms, the court will not set aside the execution. *Mitchell v. Wheeler.* 1 *H. Black. Rep.* 30. So where defendant's attorney admitted the writ of error to be brought for delay. *Goodwin v. Hammond.* T. 31 *Geo. 3. C. B.* So in *K. B. 3 Term Rep.* 79. *Lord Kenyon*: The court must exercise a discretion upon these questions ; and if the parties confess that the writ of error is brought for delay, the court will interfere, and will not permit them to abuse the forms of justice. But where the attorney offers to waive the judgment, if the defendant's attorney would point out the error, this was held to be no restraint in bringing error. *Ibid.* 79.

Verdict against four, and judgment by default against fifth defendant.

If there be a verdict against four, and judgment by default against the fifth defendant, the writ of error brought in the name of the one who was not obliged to find bail, because it was by default. Leave was given to take out execution against the four. *Mason v. Simmonds & al.* *Barn.* 202.

All parties against whom judgment is given ought regularly to join in error. *3 Mod. 134. Carth. 7. 2 Mod. Cas. 305.* They must join for conformity. *1 Roll. 747. l. 35. 2 Ld. Ray. 1403.* And must describe the suit by the names of all the parties. *Str. 682. 1 Salk. 312. 1 Wils. 88.*

Cur. Though error may be brought on a judgment of nonsuit, it does not follow that the execution ought to be set aside. And the court held, that they would in no case stay proceedings, or set aside an execution, on account of a writ of error being brought on a judgment of nonsuit, which evidently must be for the purpose of delay and vexation. *Box v. Bennett. 1 H. Black. Rep. 432. E. T. 1790.*

Error brought returnable the effoign of Hilary term. Final judgment signed same term, 26th January. Plaintiff took out execution. Motion to set it aside. *Court held,* the record well removed, and set aside the execution with costs. By consent no action to be brought. *White v. Morgan. Barnes 189.* But where error brought after interlocutory judgment, which was signed in Michaelmas term, and final judgment not signed till Hilary; the court held the execution to be regular, the interlocutory judgment not being removable by writ of error, and the final judgment being signed of a subsequent term, was not removed. *Cooke v. Harrock. Barnes 196. Contra K. B. Str. 631.*

If an action be brought on the judgment pending error, plaintiff may proceed to execution after judgment, and levy, unless motion to stay the proceedings pending error. *Humphreys v. Daniel. Barnes 202.* And such motion ought to be before judgment. *Clarkson v. Pbyssick. Ibid. 203. Cooke's Rep. 29. 159.*

Error is not a supersedeas from the sealing, but from the delivery to the clerk of the errors. *Meiston v. Stevens. Barnes 205. R. M. 28 Car. 2.* And from allowance, *Barnes 376.*

All parties to join.

Nonsuit.

If error brought and judgment signed same term, a supersedeas.

But if not signed till a term after, it is not.

Action pending error.

When error a supersedeas.

No

No contempt till notice.

No contempt is incurred by taking execution till after notice of the error, *Barnes* 376.

If execution be after error allowed, *without notice* of it, restitution shall be granted. 3 *Lev.* 312. 1 *Salk.* 321.

No person can bring the writ if he was not party, or privy to the record.

No person can bring a writ of error to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal thereof. 1 *Roll. Abr.* 747. *Dyer* 90.

Cannot be brought after twenty years.

It cannot be brought after twenty years, and the statute of limitations must be pleaded to a writ of error, as well as to an original action. *Rep. Temp. Hardw.* 346.

If brought on a judgment in C. B. it must be returnable in K. B.

If an erroneous judgment be given in this court the writ of error in all cases is made returnable into the court of *King's Bench*; and therefore if the defendant brings a writ of error to reverse the judgment, he must first make a *præcipe* for the curfitor in this form:

Præcipe for a writ of error.

Middlesex. Writ of error for A. K. against C. D. in case, on a judgment in the *Common Pleas*, returnable —, wheresoever, &c. J. B. Attorney.

If error be brought where proceedings are by bill.

If writ of error be brought where the proceedings are by bill in this court, the writ of error must be returnable on a day certain, as well as the *sci. fac. quare executionem non.* 2 *Lord Raym.* 1417.

Carry this *præcipe* to the curfitor's office *Chancery Lane*, who will make out the writ; p. 14 s. 6 d. if no private seal, if a private seal 8 s. 6 d. more.

How to get it allowed.

As soon as you have it from the curfitor, take the same to Mr. *Hough*, the clerk of the errors, Mr. *Pepy's* chambers, No. 10, in *Symond's Inn*; give him for the allowance 2 l. 2 s. 6 d. serve copy of the allowance on the plaintiff's attorney in the original action.

Of Bail in Error.

No execution be stayed by error, unless bail be put in first.

By 3 *Jac.* 1. c. 8. it is enacted, That no execution shall be stayed or delayed upon or by

writ of error, or *superfedeas* thereupon, to be sued for the reversing of any judgment given in any action or bill of debt upon any single bond for debt, or upon any obligation, with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract sued in any of the courts of record at *Westminster*, &c. unless such person in whose name such writ shall be brought, with two sufficient sureties, such as the court wherein such judgment is or shall be given shall allow of, shall first before such stay made or *superfedeas* be awarded, be bound unto the party for whom any such judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay (if the said judgment be affirmed) all and singular the debts, damages and costs, adjudged upon the former judgment; and all costs and damages to be also awarded upon the delaying of execution.

It is settled, that the plaintiff need not become bound himself, his sureties becoming bound is within the equity of the statute, and so is the settled practice of all the courts; nor can bail in error be put in before a commissioner in the country. *Cooke's Rep.* 153. *Barnes* 78. *Pract. Reg.* 180. *Lushington v. Dog.*

The plaintiff in error need not be bound, if he find sureties sufficient.

Error on judgment upon bond in the penalty of 1470*l.* *Per cur.* The sum recovered is double the debt really due, and it is sufficient for the bail to justify each in 1470*l.* *Moor v. Lynch.* 1 *Wilf.* 213.

What sum is debt on bond.

But bail is not requisite upon a judgment in an action of debt founded upon a prior judgment. 4 *Burr.* 1548. 1 *Black. Rep.* 506.

When bail not necessary.

No bail in error on a bail bond. *Cooke's Rep.* 7. *Valentine v. Dennis.*

After an award of execution against bail on a recognizance in error, they brought error as to such award of execution. *Court held,* That no bail was required in this case. *Barnes* 194.

Bail.

In action for not setting forth of tithes, nor on the case, trover, &c. bail after verdict.

Bail in error are bound for debt and costs, and cannot surrender the defendant in their discharge.

No execution shall be stayed in any of the courts of *Westminster*, &c. upon any writ of error or *superseas* thereupon, after any verdict and judgment thereupon obtained, in any action of debt grounded upon statute 2 *Ed.* 6. for not setting forth of tithes; nor in any action upon the case upon any promise for payment of money, actions for trover, covenant, detinue, and trespass, unless such recognizance, and in such manner as by the said former act is directed, shall be first acknowledged in the said court where such judgment is given. 13 *Car.* 2. s. 9.

Double costs.

Sett. 10. Gives double costs to a defendant by delay of execution, by reason of error brought, if the judgment be affirmed.

Not to extend to popular actions.

Sett. 11. Provides, That the said statute shall not extend to actions popular, or upon penal statutes, indictments, &c. other than the statute of *Ed.* 6.

No execution be stayed after verdict in any personal action.

By 16 & 17 *Car.* 2. c. 8. s. 3. No execution shall be stayed after verdict and judgment in any personal action whatsoever, unless a recognizance be entered into according to the 3 *Jac.* 1. c. 8.

Not to extend to executors.

Not to extend to any writ of error to be brought by any executor or administrator, nor unto any action popular, nor to any penal action (except debt for tithes). *Sett.* 5.

In dower and ejectione firmæ bail.

That in writs of error to be brought upon any judgment after verdict, in any writ of dower, or in any action of *ejectione firmæ*, no execution shall be thereupon or thereby stayed, unless the plaintiff or plaintiffs, in such writ of error, shall be bound in such reasonable sum as the court to which such writ of error shall be directed shall think fit; with condition, that if judgment shall be affirmed in the said writ of error, or that the said writ of error be discontinued, in the default of the plaintiff or plaintiffs therein; or that the said plaintiff or plaintiffs be nonsuit in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sums of money,

money, as shall be awarded upon or after such judgment affirmed, discontinuance or nonsuit had. Sect. 3.

The plaintiff in error may either become bound himself, or find sureties; *Cooke's Rep.* 142. and need not be bound himself, if he finds sureties. *Goodtitle v. Bennington. Ibid.*

The court thought two years value a reasonable sum, and stayed proceedings on the judgment pending error; made a general rule, that for the future these recognizances shall be taken in value of two years profits and double costs. *Roe v. Pearson. Barnes* 103.

Error on verdict in ejectment allowed; but plaintiff in error entered into no recognizance, nor put in bail, as plaintiff below had not got the costs taxed, without which the measure or quantum of the recognizance could not be fixed. Plaintiff below, for want of the recognizance and bail, in four days took out an *hab. fac. poss.* and had possession given him, which the court held to be regular. *Et per cur.* Defendant should have applied to stay execution, and the court would have obliged plaintiff to have got his costs taxed. The writ of error is no *superfedeas* without bail. A judge would have taken bail, if applied to. Rule discharged. *Barnes* 212. *Betts v. Egerton.*

If judgment be against an executor, or administrator *de bonis propriis*, and he brings a writ of error, he must put in bail in such case, and pay costs if judgment be affirmed; but if judgment be *de bonis testatoris* only, he shall neither put in bail, nor pay costs. 1 *Lev.* 245. 1 *Sid.* 368. 2 *Keb.* 295. 371. *Com.* 323. 2 *Cro.* 350.

In error on a judgment after verdict upon a *sci. fa.* against bail, there must be bail to the writ of error. 2 *Black. Rep.* 1227. *Pulteney v. Townson.* The *sci. fa.* being a personal action, vide *Barnes* 194. Held not so, if judgment be by default only.

An executor may revive the judgment, but cannot take out execution, pending a writ of error. *Barnes* 432. *Wright v. Freeweake.*

Two years profits and costs.

On error being brought, the plaintiff did not enter into recognizance, as plaintiff had not got the costs taxed.

He should have applied to stay the execution.

Executors where the judgment is *de bonis propriis*, must put in bail.

In error after verdict on a *sci. fa.* against bail, there must be bail.

Executor may revive the judgment, pending error.

If bail is required, must be put in, in four days.

If it requires bail, the plaintiff's attorney in error must put same in before one of the justices of the *Common Pleas*, within four days next after the delivery thereof to the clerk of the errors, or an execution may issue. *R. M. 28 Car. 2.*

Certificate not necessary from clerk of the errors.

A certificate is not necessary from the clerk of the errors, of no bail being put in, before execution issues. *Inckledon v. Clarke. Barnes 212.*

How to put in Bail.

How to put in bail.

Take the names of the bail and places of abode to the clerk of the errors, Mr. *Hough*, and he will go with you to one of the judge's chambers, and there take the bail, pay him for same 1*l.* 4*s.* if at *Westminster*, 6*s.* 8*d.* more; give notice thereof to defendant's attorney in error.

Writs of error to be forthwith brought to the clerk of the errors, or no stay of execution.

It is ordered, That all writs of error shall, without delay, be delivered to the clerk of the errors, and that no person shall be hindered from suing execution, under pretence of any writ of error, before any such writ of error be delivered to the clerk of the errors; and in cases where special bail is required, unless the plaintiff upon such writ of error shall within four days after the delivery thereof, put in bail according to law, and obtain a writ of superseas thereupon, the defendant may proceed to execution notwithstanding such writ of error. *R. M. 28 Car. 2.*

Of perfecting Bail and Exception.

To be perfected in four days.

It is ordered, That in all cases where the bail shall be filed on writs of error, such bail shall likewise be perfected within four days after exception taken thereto, or in default thereof, the clerk of the errors of this court shall nonpro such writs of error. *R. M. 6 Geo. 2.*

Exception.

The defendant's attorney may, if he thinks proper, except against them within 20 days next after bail put in, by applying to the clerk of the errors for a rule for better bail; pay 4*s.* serve copy thereof on

on the plaintiff's attorney, which expires in four days.

The court refused to give time to perfect bail in error, because *no real error could be suggested*, so that they thought the writ of error was brought for delay. 2 *Wils.* 144. *Handesbye v. Morgan.*

Court refused to give time to perfect.

Of justifying.

If it is intended that the bail should justify, then the defendant's attorney will give notice thereof, *two days exclusive* of the day to justify the same, the form of which notice is as follows; which must be done *within four days after exception.*

What notice of justification requisite.

In the Common Pleas.
In error.

{ C. D. plaintiff,
and
A. B. defendant.

Take notice that the bail already put in for the plaintiff in this cause on the writ of error, and of whom you have had notice, will, on *Monday* the day of next, justify themselves in this honourable court at *Westminster-hall*, in the county of *Middlesex*, as good and sufficient bail for the said plaintiff. Dated this day of 1793.

Notice of justifying bail.

To Mr. J. K. attorney for defendant in error.

Yours, &c.,
J. B. attorney for plaintiff in error.

It is said, where a rule for better bail is served in vacation, defendant has not till the next term to perfect his bail, but ought to justify before a judge. *Barnes 211. De Revouse, executor, v. Hayman.* And if plaintiff be not satisfied with that, the defendant, having done every thing in his power, is intitled to time, till the next term, but not otherwise. This is the settled practice of the court; and so said Mr. *Gerrard* in his life-time.

When to justify.

The K. B. contra. Vide my 5 edit. 672.

This puts the party to double the expence.

The day before you intend justifying, go to the clerk of the errors, and desire him to attend with the

How to justify.

the bail-book, make affidavit of the service of the notice, give it to a serjeant, "*to move to justify the bail*;" pay him 10s. 6d. pay for the justification and court fees 15s. in the evening draw up the rule for the allowance at the secondaries, pay 5s. serve copy on defendant's attorney,

Rule to transcribe.

Rule to transcribe.

If there is no bail required, as for instance, on judgment by *default*, in *case*, *trespass*, and the like, the defendant in error upon the return of the writ gets a rule to transcribe (and the same is done by him, after bail perfected, as the next step); get same of Mr. *Hough*, pay him 4s. copy same, and serve on plaintiff's attorney, or it may be served on plaintiff in error. *Barnes* 410.

It has been held, that this rule may be served on plaintiff—Such rule is excepted out of the general practice. *Green v. Upton. Barnes* 410.

How plaintiff's attorney in error is to proceed.

The plaintiff's attorney, before this rule expires, which is in *eight days next after the service*, may pay one guinea in part of the transcript to the clerk of the errors; and before it is complete the clerk of the errors will send for more.

Transcript how expedited.

Mr. *Hough*, if there is time, will carry over the transcript in the same vacation; or if the rule be given in term (if he has time sufficient), he will take same in the last day of that term, which expedites the bringing a writ of error to a speedy determination, which had not used to be the case.

If transcript not paid for, execution may issue.

If the transcript be not paid for in due time, execution may be taken out after a certificate obtained from the clerk of the errors, that the plaintiff has made default in transcribing; and such certificate must be made in writing by the clerk of the errors. *R. M. 28 Car. 2.*

Tho' record not transcribed, yet bail in error liable.

Court held, That though the record should not be transcribed, yet the bail being bound to prosecute the writ of error with effect, will be liable. *Roe v. Whitehead. Barnes* 499.

As to an Original.

An original is wanting only in case where judgment goes by default; therefore if there be no original filed, and the vacation of the term in which judgment is signed is elapsed, the defendant's attorney must, before he takes out a rule to transcribe, petition the *Master of the Rolls* for an original, which ought to be returnable the term on which the proceedings are entered on the roll; therefore if you expect a writ of error, get the original allowed by the prothonotary, in the taxing of the costs, and make a *præcipe* for the original forthwith; which take to the curfitor, and he will make it out for you; for in case this is neglected, the Master of the Rolls will not order the original to be made out, "*but upon payment of costs to the plaintiff in error, in case he does not further prosecute the writ*;" a copy of the petition, and the Master of the Rolls' order thereon, must be served on the plaintiff's attorney; and if he neglects to proceed, then no costs are to be allowed; pay for your order 5 s. 6 d. carry same to the curfitor, with a *præcipe*, and he will make out the original, leave it with the sheriff of the county where the *venue* is laid, for return of *nihil*, pay 1 s.

How defendant's attorney is to proceed, when no original filed. Vide my Instr. Cler. 5 ed. 682. as to the time to bespeak the original.

When the original is sealed, and the return filed, carry it to the *custos brevium* of the Common Pleas, in *Brick-court*, and file it; pay him 4 d. for same, and 4 d. every post-term after the return.

In the Common Pleas, { *A. B.* plaintiff,
and
C. D. defendant.

The humble Petition of the said A. B. the Plaintiff,

Humbly sheweth,

That your petitioner having, in *Easter term* 1793, commenced an action at law against the above-named *C. D.* late of *Westminster* in the
county

county of Middlesex, yeoman, in his Majesty's court of Common Pleas at *Westminster*, in a plea of trespass on the case, to his damage of 60*l.* and your petitioner hath laid his *venue* in the county of *Middlesex*; and judgment hath been obtained in such action in *Trinity* term last past, for 35*l.* damages, and 12*l.* 10*s.* costs, whereupon the said defendant hath brought his writ of error, returnable in his Majesty's court of *King's Bench* on the morrow of *All Souls*, wheresoever, &c. but no further proceedings have been had thereon.

That your petitioner hath not as yet sued out any original writ to warrant the said judgment, and that he is advised it is necessary that the same should be sued out to warrant the said judgment, and the time for applying for the same in the ordinary course is expired, and that the curfitor of the said county cannot make out the same without an order from your Honour,

" Your petitioner therefore humbly prays
 " your Honour, to grant unto him an order,
 " that the curfitor of the said county
 " of *Middlesex* may issue an original writ in
 " this cause, out of this honourable court,
 " returnable in his said Majesty's court of
 " *Common Pleas*, on, &c.

" And your Petitioner shall ever pray, &c."

When original warrants the proceedings.

Where the want of an original writ is assigned for error, and it appears that all the proceedings are of the same term wherein the original is returnable, such an original warrants these proceedings; let it be of any return of the same term; but an original of the term wherein final judgment is given will not warrant it, if by the record it appears that there have been proceedings in the cause in the term or terms before. 1 Will. 182. *Dyke v. Sweeting*.

Make a tender of costs.

After service, make a tender of the costs in error to plaintiff's attorney, which if he accepts you may *non-pros*, and take out execution.

After

After service of the rule to transcribe, leave a copy of the proceedings with the clerk of the errors, and of the judgment (of course the roll is to be docketed and carried in).

When the transcript is complete, defendant's attorney in error attends on the clerk of the errors, who will examine same; after it is examined, the clerk of the errors delivers over the transcript to Mr. Webb, in the King's Bench office, with the writ of error annexed; each party may have a copy upon paying 4*d.* per sheet; but it is incumbent on the attorney for defendant to order it forthwith, as it will be wanted in the future stage of the cause.

Upon the delivery of the transcript over to Mr. Webb, the cause is then said to be in the court of King's Bench, therefore the defendant's attorney will proceed by *scire facias quare executionem non, to shew* "cause why execution should not be adjudged to the plaintiff," which is made returnable, if the proceedings are by original, not on a day certain, but generally, *wheresoever the king shall then be*, and tested, if the transcript be completed, the last day of term on that day, returnable the first day of the next term; if it is complete in vacation, and not delivered over till the first day of the next term, then it is to bear *teste* that day, and there must be fifteen days between the *teste* and return of both.

But if the proceedings are by bill, the *sci. fa.* must be made returnable on a day certain. 2 Lord Raym. 1417.

Of amendment, vide my Instr. 5 edit. 682.

Error had been brought in the name of Smith (who had a verdict, on the first trial, in his favour) as well as of Verelst, against whom the judgment was entered. This the curfitor made affidavit happened by mistake, and contrary to his instructions, which were to sue error for Verelst only. K. B. was moved to quash the writ on part of defendant in error; on the part of the plaintiff in error, to amend it by striking out the name of Smith.

The

If plaintiff's attorney proceeds in error, then how to proceed.

Defendant's attorney to sue out *sci. fa.*

Returnable, &c.

Teste.

But if by bill.

Where writ of error is amended in B. R. new bail shall be given on amended writ in C. B.

The court discharged the former rule, and made the latter absolute. The recognizance of bail having necessarily followed the writ, the same mistake had happened there, so that in fact, there was no bail to the amended writ. — Whereupon plaintiff below sued out execution and levied: and though the plaintiff in error offered to alter the recognizance, agreeable to the amended writ, it would not be accepted. Motion to set aside the execution and amend the recognizance; and the bail having entered into a new recognizance in court, rule absolute and to restore the goods. *Rafael v. Verelst.* 2 *Black. Rep.* 1067.

Consent to confess judgment on a second action.

A consent to confess judgment on a second action with a stay of execution, till a writ of error determined on the original judgment, does not prevent a writ of error being brought on the second judgment, after affirmance of the first. *Wade v. Rogers.* 2 *Black. Rep.* 780. But for the future, the rule to express not to bring error upon the second judgment.

For the rest of the proceedings in the King's Bench, vide my Instruēt. Cleric. 5 edit. p. 682.

Of Action on Judgment pending Error.

Where special bail has been given to the original action, there *no bail* is required in an action on the judgment against the principal pending error. *Jackson v. Duckett*, for that would be bail *ad infinitum*. *Pract. Reg.* 54.

So if there be an action on the judgment, although no error pending, *no bail* is required, if there be bail in the original action; but if there be no bail in the original action, then there must be bail. *Crutchfields v. Sewards.* *Barn.* 116.

Bail shall be given in debt on the judgment, though none to the original action, and

On motion to stay proceedings in debt on the judgment, and that the bail bond might be delivered up; because the defendant had brought error in the *K. B.* so that two securities are obtained at once for the same cause of action, contrary to Lord *Ray,*

Ray. 47. Cause shewn was, that there was *no* bail to the original action; in which case the practice is to require bail on the action on the judgment, notwithstanding the bail in error, which the court agreed to. *Pract. Reg. 57. Comyn. 556.* And *Gould, J.* said, The reason of the practice is, because there has never been bail given in this court. These are checks against delay, and ought not to be taken off. Rule disch. *Kendal v. Carey. 2 Black. Rep. 768. Barn. 71.* Same determination in *K. B. Cowp. 556.*

If plaintiff defers signing judgment till error spent, and then brings debt on the judgment, the court will order a new writ of error at attorney's expence. *Barn. 250. Arden v. Lamley.*

Of quashing Error.

If brought by one of two defendants, it may be quashed. *8 Mod. 305. Str. 233. 5 Mod. 338. Salk. 319.* So for variance. *2 Str. 1110.*

The forms of the different Præcipes for Originals, to warrant the Judgment by default in case Error is brought.

Middlesex, (ff.) If *John Denn* make you secure, In case, &c. then put, &c. *Richard Fenn*, late of *Westminster*, in the said county, merchant, that he be before our justices at *Westminster*, on the morrow of the *Holy Trinity*, to shew, For that whereas (here set forth the whole declaration verbatim). To the said *John* his damage of 50*l.* as is said, &c.

London, (ff.) Command *Richard Fenn*, late of *London*, merchant, That justly, &c. he render to *John Denn* 100*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him, &c. Returnable before his Majesty's justices at *Westminster*, on the morrow of the *Holy Trinity*.

London, (ff.) Command *Richard Fenn*, late of *London*, merchant, That justly, &c. he render to *A. B.* executor of the last will and testament of *J. K.* deceased,

though a writ of error is brought.

non est in iudicio
non est in iudicio
non est in iudicio

In debt.

In debt against
an executor.

deceased, 50*l.* of lawful money of *Great Britain*, which he unjustly detains from him, &c. Ret. (as before).

In covenant.

Middlesex, (ff.) Command *Richard Fenn*, late of, &c. that he justly, &c. perform to *John Denn*, the covenant made between them, according to the force, form, and effect of a certain indenture made between them. Ret. (as before).

On all *præcipes quod reddat*, if the sum exceeds 40*l.* a fine is payable to the king in the following proportions :

	£.	s.	d.
From 40 <i>l.</i> to 100 marks - -	0	6	8
From 100 marks to 100 <i>l.</i> - -	0	10	0
From 100 <i>l.</i> to 200 marks - -	0	13	4
From 133 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> to 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> -	0	16	0
From 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> to 200 <i>l.</i> -	1	0	0
And so consequently for every 100 marks more - -	0	6	8
And for every 100 <i>l.</i> more - -	0	10	0

Præcipe in account.

Surrey, to wit, Command *C. D.* late of *E.* in the county aforesaid, gent. That he render to *F. G.* his reasonable account, for the time which he was receiver of the money of him *F.* &c.

If a bailiff.

If a bailiff, then as before, to account for the time in which he was bailiff of him *F.* in *E.* &c.

If bailiff and receiver.

If a bailiff and receiver, then for the time which he was his bailiff in *E.* and receiver of the money of him *F.* &c.

In detainee.

Somerset, to wit, Command *C. D.* late of, &c. yeoman, That he render unto *F. G.* one mare, one cow, &c. (as the case requires), of the price of ten pounds, which he unjustly detains from him, &c.

In annuity.

Somerset, to wit, Command *C. D.* late of, &c. yeoman, That he render unto *F. G.* 100*l.* of lawful money of *Great Britain*, which to him are in arrear, of a certain annual rent of 50*l.* which to him he owes, and unjustly detains, &c.

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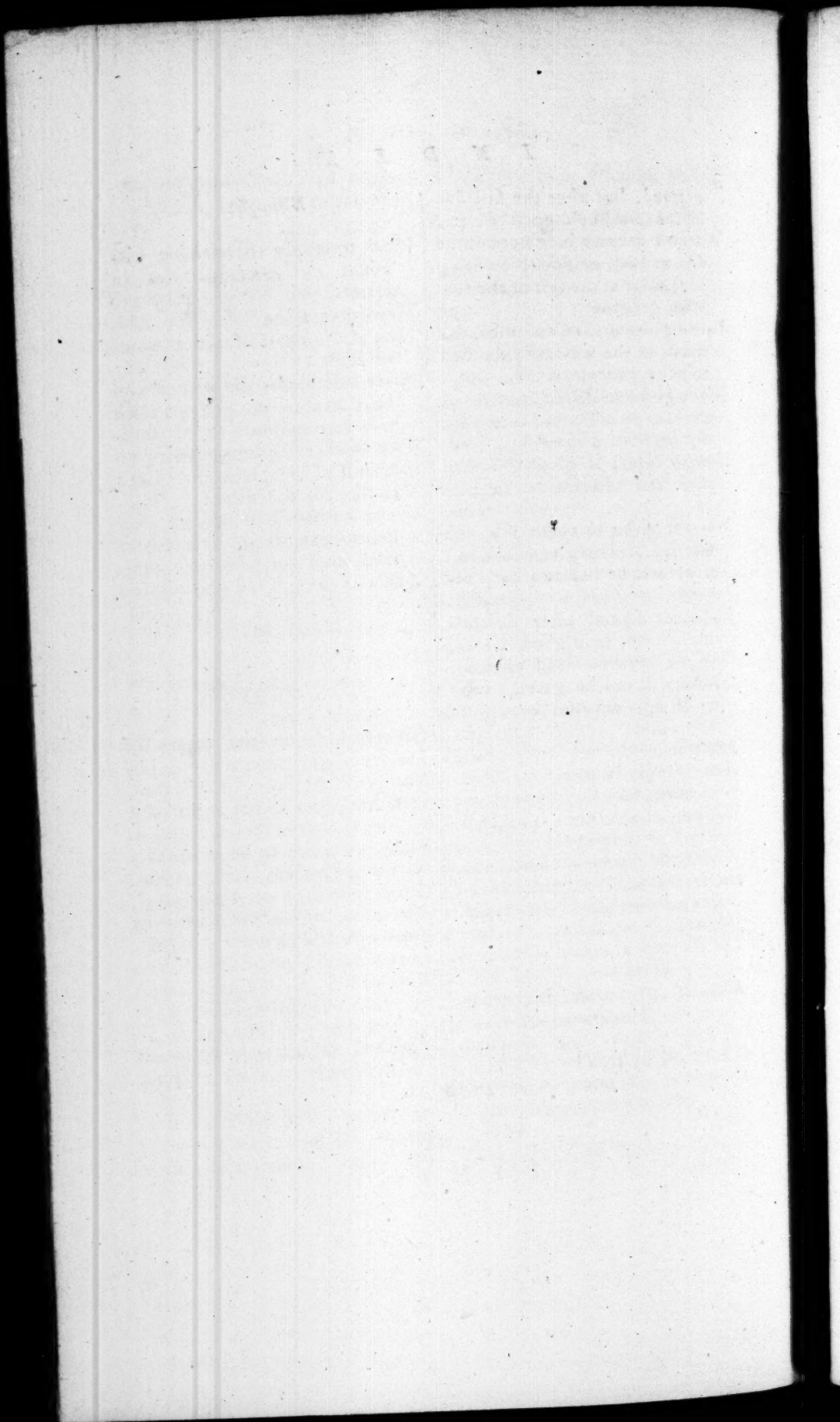
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